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HEARING

IN THE MATTER OF:

SATELLITE RATE ADJUSTMENT

DOCKET NO.

96-3 CARP-SRA

Thursday,
March 13, 1997

CARP Hearing Room LM414
Library of Congress
101 Independence Ave., S.E.
Washington, D.C. 20540

The above-entitled matter came on for hearing,
pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

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ALSO PRESENT:

William Roberts, Copyright General Counsel, CARP
Tanya Sandros, Administration, CARP
Vivian Roque-Balboa, Administration, CARP
Christine Walsh, Paralegal,
Cole, Raywide & Braverman
Jerry Parker, United Video Satellite Group
Ed Desser, Witness
James Trautman, Witness
Andy Paul, Senior Vice President, SBCA

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C-O-N-T-E-N-T-S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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James Trautman

By Ms. Behan	109			
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By Mr. Glist	180			
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E-X-H-I-B-I-T-S

<u>Exhibit No.</u>	<u>Description</u>	<u>Marked</u>	<u>Recd</u>
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Joint Sports Claimants

1B	Dec. 1996 FCC Report	130	130
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SBCA

1X	Donaldson, Lufkin & Jenrett JT4	195	
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2X	Article	212	
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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRMAN GRIFFITH: Ladies and gentlemen,
good morning. I'll begin, once again, by swearing the
Reporter, please, if you'll raise your right hand.

(Whereupon, the Court Reporter was duly
sworn.)

Once again, good morning and welcome.

My fellow arbitrators assure me that they
have diligently reviewed the information contained in
the various written direct testimony in cases which
you have filed, and our principal concern at the
moment is that you're going to begin presenting to us
testimony and evidence which will further confuse us.

That notwithstanding, we are prepared to
go forth.

(Laughter.)

I want to call on my fellow arbitrators.
We have just several preliminary matters that we want
to bring to your attention. One thing I want to
mention which was just brought up is I related last
time that this room was unavailable on the first full

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1 week of May, which I believe begins with the 5th of
2 May.

3 We have been told that public hearings
4 will be held in this room concerning the cable and
5 satellite compulsory license legislation. We want to
6 assure you that we will not be present during those
7 proceedings. Judge Cooley even suggested that we will
8 not read the newspapers and we'll turn off our TVs --

9 (Laughter.)

10 -- in the event that it should be
11 transmitted in any way.

12 First let me call on Judge Gulin. You
13 have one comment you want to make concerning
14 procedure.

15 JUDGE GULIN: Yes. It would be helpful to
16 us if counsel could provide us with a list of counsel
17 in the order that they will be cross examining each
18 witness. Of course, all counsel will not be cross
19 examining all witnesses, hopefully. Many will be
20 passing. But if you haven't already agreed upon an
21 order, if you would please confer with each other and
22 provide us with that order. If you cannot agree, of

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1 course we'll set an order.

2 The other thing -- I just wanted to remind
3 counsel, before speaking, to always identify yourself
4 for the record for the benefit of the Court Reporter.
5 Obviously, if you're engaged in a colloquy you don't
6 have to do that each time you speak, but at the
7 beginning of an examination. That's all I wanted to
8 say.

9 CHAIRMAN GRIFFITH: Okay. Judge Cooley?

10 JUDGE COOLEY: Yes. I'd just like to
11 raise a point about the schedule and ask you to think
12 in the next day, or maybe as late as Monday, about the
13 schedule after April 16th. Some of us, not only on
14 the panel, but I think in the room, would like to know
15 when the open period will be so we can schedule other
16 matters.

17 As I said, I think we're scheduled -- our
18 last hearing day was April 16th. There are a couple
19 more days, obviously, in that week because it's
20 Wednesday. As far as I know, I think we would be
21 available those two days if there is a need -- if we
22 have underestimated the time needed for the witnesses

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1 up to that point.

2 As far as the next week goes, I don't know
3 if we'll go into that, or we'll have to go into that
4 week. I just planned it. But I think April 21st and
5 22nd -- it's passover time. So we probably would want
6 to avoid those two days, and maybe the rest of that
7 week would be a possibility for you.

8 Then we have to think about that hiatus
9 for you to get ready for the rebuttal case. And I'm
10 not saying at this time how long that should be, but
11 it will be nice if it can go throughout the period of
12 this week that we can't use this room, and it looks
13 like it will fall in that period. So if you can be
14 thinking about those things. I don't know if tomorrow
15 is enough time for us to talk about this, but maybe on
16 Monday.

17 Yes?

18 MS. WOODS: Your Honor, Michele Woods
19 representing Public Television. We have had some
20 preliminary discussions about the schedule, and I
21 think we will be able to come forward, I hope, with a
22 proposal or at least give you our position on this.

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1 And I can tell you that based on our preliminary
2 discussions, that week in May would be open.

3 JUDGE COOLEY: Okay. Thank you.

4 CHAIRMAN GRIFFITH: Okay. Thank you.

5 Only one other thing that I want to
6 mention as a pending matter for your consideration, or
7 for your information is this. We believe that there
8 are presently three outstanding motions in these
9 proceedings. The first one -- these are not
10 necessarily in the order in which they were filed --
11 is ASkyB's motion in limine. That motion was filed I
12 think last Thursday. We received your responses this
13 morning. We intend to rule on that motion either
14 tomorrow or Monday at the latest. We will then
15 prepare an order setting forth the basis for our
16 ruling on that motion.

17 The second motion which I am aware of is
18 the Satellite Carriers' motion to strike the testimony
19 of Thomas P. Olson. Preliminary information I have is
20 that the Joint Sports Claimants are going to begin
21 their presentation hopefully today. You'll be calling
22 Mr. Trautman, Mr. Desser, and then we'll go to the

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1 others, Mr. Olson sometime probably Monday or Tuesday.

2 We anticipate and are going to make every
3 effort to rule on the motion with respect to the
4 motion to strike the testimony of Thomas P. Olson on
5 Monday.

6 The third motion I am aware of is the
7 Joint Sports Claimants' motion to amend their direct
8 case on the basis of certain typographical errors. I
9 want to inquire: is there any objection to that
10 motion?

11 MR. GLIST: Your Honor, we have not had
12 the opportunity to review that motion against the
13 originally-filed testimony. But we will be in a
14 position tomorrow morning to be able to respond to
15 that.

16 CHAIRMAN GRIFFITH: We'll defer that
17 matter until tomorrow morning, then, for a ruling.
18 All right.

19 And that is all of the preliminary matters
20 that we have. Yes, sir?

21 MR. OSSOLA: Your Honor, I'm Charles
22 Ossola for the Commercial Networks. I will be

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1 presenting the testimony of Mr. Olson, and my question
2 is whether the panel anticipates hearing oral argument
3 on the motion to strike his testimony.

4 CHAIRMAN GRIFFITH: Are you requesting
5 oral argument?

6 MR. OSSOLA: Well, I'm not requesting it.
7 I actually was simply asking for the panel's
8 inclination so I could plan accordingly.

9 CHAIRMAN GRIFFITH: Our inclination is no.

10 MR. OSSOLA: Would the panel be open to --
11 if that matter is going to be resolved Monday, would
12 the panel be amenable to at least tomorrow morning
13 being advised as to our position with respect to
14 whether we think oral argument might be helpful?
15 Obviously, I'm hearing that you don't think it would
16 be, so --

17 CHAIRMAN GRIFFITH: Well, we say that and
18 the fact that that's probably one of the few things we
19 haven't read --

20 MR. OSSOLA: I see.

21 CHAIRMAN GRIFFITH: -- at this point. For
22 instance, just me as an example, I have read the

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1 motions. I have not had an opportunity to read the
2 responses yet.

3 MR. GLIST: Your Honor, just to express
4 our views, the Carriers think that very brief oral
5 presentation on that motion would help to illuminate
6 what is at issue. And so we would recommend that you
7 consider taking --

8 CHAIRMAN GRIFFITH: We'll try to make that
9 decision by tomorrow morning and let you know.

10 MR. OSSOLA: I have no disagreement
11 with --

12 CHAIRMAN GRIFFITH: Okay.

13 MR. OSSOLA: Thank you.

14 CHAIRMAN GRIFFITH: Any other preliminary
15 matters that you have? Any of you?

16 MR. GLIST: Your Honor, there is one other
17 outstanding motion, which was --

18 CHAIRMAN GRIFFITH: Do you want to
19 identify yourself now for the Reporter?

20 MR. GLIST: Paul Glist, Your Honor. At
21 our opening session last week, I had made an oral
22 motion to deal with the presentation of incorporated

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1 testimony for which there is no sponsoring witness.
2 And I would simply like to know from the panel at what
3 time such a motion could be formally entertained since
4 there is no natural point in a hearing to deal with
5 that.

6 CHAIRMAN GRIFFITH: Do you have a comment
7 on that?

8 MS. WOODS: Michele Woods from Public
9 Television Claimants. We have, of course, responded
10 that that motion was previously dealt with by the
11 Copyright Office and that there is a new motion that
12 we should receive something in writing that we could
13 just sponsor.

14 CHAIRMAN GRIFFITH: All right. That was
15 my understanding, that it had been previously dealt
16 with. Is this a new matter that you're raising?

17 MR. GLIST: The Copyright Office has
18 issued a ruling --

19 CHAIRMAN GRIFFITH: Yes.

20 MR. GLIST: -- with respect to this. We
21 would like to renew that motion before the panel so
22 that we can understand what the consequences would be

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1 of incorporating that.

2 CHAIRMAN GRIFFITH: Okay. And you were
3 raising constitutional issues last time, correct?

4 MR. GLIST: Yes, sir.

5 CHAIRMAN GRIFFITH: If you'll file the
6 motion in writing in the time period provided for
7 response -- what is that, five days? Can you do it --

8 MS. WOODS: I believe it's actually 10.
9 We might be able to agree to a more abbreviated
10 schedule, although this is obviously going to come up,
11 you know, probably before that, because some of those
12 witnesses will come up. So I don't know how the panel
13 wants to handle that. But if we're seeing new
14 constitutional issues, we will need some time to --

15 MR. GLIST: Just to clarify, Your Honor,
16 we're speaking only of incorporated testimony for
17 which there is no witness here.

18 CHAIRMAN GRIFFITH: For which there will
19 be no witness here or present.

20 MR. GLIST: That's right. If a witness
21 appears who is incorporating previously submitted
22 testimony that is subject to cross examination, we

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1 will take our cross. But if Sharon Rupweiler does not
2 walk into the room, then I have a problem with
3 incorporating that testimony.

4 MS. WOODS: Your Honor, what Mr. Glist is
5 asking for is basically for the panel to overrule or
6 invalidate a rule of the proceeding of the Copyright
7 Office. And with all due respect, I believe the
8 appropriate place to address that motion really would
9 be to the Copyright Office for reconsideration. And
10 we certainly believe that the motion would at some
11 point have to go to the Copyright Office for
12 consideration on the issue.

13 CHAIRMAN GRIFFITH: All right. You're
14 actually renewing the motion which was made and the
15 Copyright Office has ruled on, is that correct?

16 MR. GLIST: That's correct, with possible
17 objections to consider in the course of this hearing.

18 CHAIRMAN GRIFFITH: We anticipate the
19 possibility that we can meet during one of the breaks
20 during the day today and rule on that, and we would
21 advise you of our ruling.

22 MR. GLIST: Okay.

1 CHAIRMAN GRIFFITH: Yes, sir?

2 MR. GARRETT: Your Honor, Bob Garrett for
3 the Joint Sports Claimants. Just a brief remark here.
4 I'm concerned that we're about to establish a rather
5 dangerous precedent in here in this proceeding. When
6 we were setting up the rules to govern the CARP
7 proceedings, there was a lot of thought given to this
8 dual process here where we had a pre-controversy
9 period and then the six-month period.

10 And there were proposals at one time that
11 would have allowed the panel essentially to be ruling
12 on motions of this nature. I think it was the feeling
13 that it would be impossible, or it would be very
14 difficult at least, to have proceedings being
15 completed within the six-month time period if all of
16 those motions were going to be ruled upon by the
17 panel. And it's for that reason that that pre-
18 controversy period was set up to deal with those
19 matters.

20 Now, if anyone who was disappointed with
21 one of the Copyright Office's rulings can come in at
22 this stage here and reopen it, I mean you would really

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1 nullify the whole purpose for that pre-hearing
2 procedure. And without, you know, commenting on the
3 specific merits of Mr. Glist's specific motion, I
4 would urge the panel not to be redoing everything that
5 the Copyright Office has already done. There are good
6 and valid reasons why this procedure was set up.

7 Thank you.

8 CHAIRMAN GRIFFITH: Thank you.

9 Yes, sir?

10 MR. LANE: Dennis Lane for the Program
11 Suppliers. I'd like to point out to the panel as well
12 that this testimony which we brought in, as well as a
13 couple of the other parties, is allowed under the
14 rules. And if there was going to be a constitutional
15 challenge, it should have been done during the course
16 of the rulemaking which occupied a couple of years and
17 a couple of rounds of meetings.

18 To suddenly hear that there is a
19 constitutional problem with an established rule I
20 think is not a matter that you could really deal with,
21 except in a very limited sense. And it obviously was
22 brought to the Librarian as well. The Librarian would

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1 have to consider the implications to the entire rule,
2 so I would suggest that this is clearly out of your
3 jurisdiction and not timely by the SBCA.

4 CHAIRMAN GRIFFITH: Well, as indicated, we
5 hope that we'll be able to resolve that matter during
6 one of the breaks today. If we're unable to do so, we
7 will come back to you and suggest to you the
8 appropriate way that we feel is necessary in order to
9 deal with the issue which has been raised.

10 All right. It appears to me at this point
11 that we are ready to commence. And if my information
12 is correct, I know that you've agreed that the owners
13 will go first, and it's my understanding that the
14 Joint Sports Claimants will go first. Is that
15 correct?

16 MR. GARRETT: That is correct, Your Honor.

17 CHAIRMAN GRIFFITH: With your opening
18 statement?

19 MR. GARRETT: Yes, Your Honor.

20 CHAIRMAN GRIFFITH: All right.

21 MR. GARRETT: I usually try not to stand
22 with my back to my opponents. I'm going to have to

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1 make an exception.

2 CHAIRMAN GRIFFITH: Sounds like a good
3 idea.

4 Let me just suggest one thing to guide
5 maybe all of us. Why don't we tentatively plan on
6 taking say a recess about 11:30 for maybe 10 minutes,
7 and we'll take our lunch recess from 1:00 until 2:00,
8 and then in the afternoon we'll take a recess
9 somewhere around 3:15 or so for 10 minutes or so.
10 Once again, we'll attempt to close up about between
11 4:30 and 5:00, so the Arbitrators have an opportunity
12 to spend a half an hour or an hour as needed. All
13 right? Thank you.

14 MR. GARRETT: Mr. Chairman, members of the
15 panel, my name is Bob Garrett. I'm a partner with the
16 law firm of Arnold & Porter. Along with my
17 colleagues, Ms. Behan and Mr. Greenstein, I represent
18 the Joint Sports Claimants in this proceeding. The
19 Joint Sports Claimants are comprised of Major League
20 Baseball and its member clubs, the National Basketball
21 Association and its member clubs, the National Hockey
22 League and its member clubs, and the National

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1 Collegiate Athletic Association and the various
2 colleges and athletic conferences that it represents.

3 As you know by now, there are seven groups
4 of copyright owners in this proceeding. Joint Sports
5 Claimants is one of those groups. In addition, we
6 have the Commercial Networks, we have the Program
7 Suppliers represented by the Motion Picture
8 Association of America, we have the Broadcast
9 Claimants, the Devotional Claimants, the Music
10 Claimants, the Public Television Claimants -- I knew
11 she would remind me.

12 These seven groups collectively represent
13 the many hundreds of individual copyright owners who
14 share in every dollar that goes into the Section 119
15 royalty fund.

16 Now, each of the copyright owner groups
17 has presented its own separate direct case. I believe
18 that each of the counsel for the different copyright
19 owner groups will request an opportunity to address
20 you at the start of his or her case. But what I would
21 like to do this morning, in addition to presenting the
22 opening for the Joint Sports Claimants, is to give you

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1 a general overview of the cases that are being
2 presented by all of the copyright owner groups.

3 I have three principal objectives this
4 morning. The first is to explain some of the basic
5 terms that we are going to be using throughout this
6 proceeding -- throughout my opening statement and this
7 proceeding. Secondly, is to give you our view of
8 Section 119 and what we believe it requires you to do
9 in this proceeding. And finally, I would like to tell
10 you a little bit about all of the copyright owners' 13
11 witnesses and the testimony that they will be
12 providing.

13 Before I begin, however, let me just
14 briefly summarize the position of the copyright
15 owners. This is sort of the Readers Digest version of
16 my next 25 pages here.

17 Normally, when a commercial entity seeks
18 to use the programming that we create, it must
19 negotiate with us over the price and the other terms
20 and conditions for that use. And that really is a
21 fundamental principle of copyright law. If you are a
22 copyright owner, you have the right to ensure that no

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1 one exploits your product without having an
2 opportunity to negotiate with that person over price,
3 terms, and conditions.

4 Satellite Carriers, however, have
5 successfully lobbied Congress in this case to afford
6 them an exemption from that copyright principle. As
7 you know by now, Section 119 of the Copyright Act
8 grants Satellite Carriers what we call a compulsory
9 license, or, as it's more euphemistically called, a
10 statutory license. But it's a compulsory license
11 which allows them to retransmit television broadcast
12 signals to their paying subscribers, and to charge the
13 subscribers a fee for doing so.

14 What this means, what the compulsory
15 license means, is that the Carriers may sell the
16 copyrighted programming on these television broadcast
17 signals to their subscribers without obtaining the
18 consent of the copyright owners. The one right we
19 have is the right that's involved in this proceeding.
20 As you know, the purpose of this proceeding is to
21 determine the royalty rate that the Carriers must pay
22 for the compulsory license.

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1 And more specifically, Section 119 of the
2 Copyright Act requires you to determine the fair
3 market value of that compulsory license. Now, that
4 statutory requirement is a very different requirement
5 than the one that the arbitration panel had five years
6 ago when it set what are now the existing Section 119
7 royalty rates.

8 And the focus in that 1992 proceeding was
9 really on achieving parity with the compulsory
10 licensing royalties that cable systems pay under
11 Section 111, which is a separate compulsory license.

12 Well, that has changed. The objective
13 here is not on cable parity. It's on achieving fair
14 market value. Now, fair market value simply means the
15 price that would be paid by a willing buyer to a
16 willing seller. That's the commonly accepted meaning
17 of the term "fair market value."

18 In our view, the best way to determine
19 that price is by looking at actual free market
20 transactions in an analogous market -- in other words,
21 in a market where copyrighted television programming
22 is bought and sold without a compulsory license.

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1 Again, in our view, the most analogous marketplace is
2 the marketplace involving cable network programming.

3 We urge you to look at the license fees
4 that the Satellite Carriers and cable operators and
5 others -- the fees that they are paying in free market
6 transactions for the right to use copyrighted
7 television programming on cable networks. We ask you
8 to look, in particular, at the escalation in those
9 license fees that has occurred during the past five
10 years -- the same period in which the Section 119
11 royalty funds have remained static.

12 And when you look at the cable network
13 marketplace, we believe that what you will see is that
14 the existing Section 119 royalty rates do not reflect
15 fair market value. They are significantly below the
16 rates that would be paid by a willing buyer to a
17 willing seller, both now and during the three years
18 that the rate you set in this proceeding must remain
19 in effect. And that is why we are seeking a very
20 significant increase in the existing Section 119
21 royalty rates.

22 Let me just start by talking about some of

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1 the different terms we are going to be using in this
2 proceeding. First, the statute talks about the
3 television broadcast stations. And as I mentioned
4 earlier, the Section 119 compulsory license covers
5 only television broadcast stations. A television
6 broadcast station is simply a station that is licensed
7 by the Federal Communications Commission to provide
8 television programming to a particular community or a
9 group of communities.

10 Each station transmits over a particular
11 frequency that a consumer may receive simply with a
12 pair of rabbit ears or an outside antenna. A viewer
13 who is located in a community served by that
14 television station is able to receive all of the
15 programming on that station free off the air, without
16 the need to subscribe to cable television, or the
17 service provided by the Satellite Carriers, or any
18 other type of subscription television service.

19 For example, assume you live here in the
20 D.C. area and don't subscribe to any cable system, and
21 don't subscribe to service provided by the Satellite
22 Carriers. If you turn your TV on to channel 9 what

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1 you'll see is Station WUSA, which is licensed to
2 Gannett Broadcasting. You can turn on channel 9 this
3 evening, what you will see on channel 9 is the NCAA
4 basketball tournament here in D.C.

5 The further you go away from Washington,
6 D.C., the less likely you are to be able to receive
7 the programming that is on channel 9. And when you
8 get to Judge Cooley's home in Evanston -- we know
9 where you live, Judge --

10 (Laughter.)

11 By the time you got to Evanston, outside
12 of Chicago, if you turned on channel 9 you wouldn't
13 see WUSA. You would see WGN, which is licensed to the
14 Chicago Tribune, the world's greatest newspaper as we
15 all know. And if you turned on channel 9 this
16 evening, and if you're really lucky, what you'll see
17 maybe is a spring training game involving the Chicago
18 Cubs, which is not the world's greatest baseball team.

19 Both WUSA and WGN broadcast on a frequency that
20 is assigned to channel 9 in the particular areas. But
21 again, depending on how far you are away from the
22 cities that they're licensed to, you may or may not be

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1 able to see that particular station. And that's what
2 we mean by a television broadcast station. It's
3 probably one thing we're all most familiar with here.

4 Now, there are in the -- I'm not certain
5 if everyone can see this, so we did make some xerox
6 copies of this chart here that we're happy to pass out
7 if anybody has problems.

8 There are approximately 1,500 television
9 broadcast stations in the United States. My friends,
10 the Satellite Carriers, have selected -- or at least
11 at the end of June of 1996 had selected 23 of those
12 television broadcast stations and placed them up on
13 the satellite. As you can see, those 23 stations
14 generally come from the nation's largest television
15 markets, such as Boston and New York, Philadelphia,
16 San Francisco, Seattle, and somehow Raleigh got stuck
17 in there as well.

18 But that's what we're talking about in
19 this proceeding here -- these 23 stations, the
20 copyrighted programming, the copyrighted musical works
21 that appear on those stations.

22 As you can see, WGN is one of those

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1 stations, and what means is that since it's up on
2 satellite, if you have a satellite-receiving dish, and
3 you pay your money to one of the Satellite Carriers,
4 you may be able to see WGN no matter where you are in
5 the country. You can get it here in Washington, D.C.,
6 or you can get it out on the west coast, or down in
7 Texas, or wherever.

8 But you can't get WGN free off the air in
9 all of those parts of the country. You can get it if
10 you pay a fee, and the Satellite Carriers are one of
11 the services that charges people fees in order to
12 receive programming by WGN.

13 Now, Section 119 talks about two different
14 types of television broadcast stations. And again,
15 these are terms you will also hear throughout this
16 proceeding. The first type of television broadcast
17 station is a network station, and the other type is
18 what is referred to as a superstation. And my
19 handwriting -- you can see why I didn't draw the map
20 myself here.

21 Now, a network station, under Section 119,
22 is simply a station that provides the programming that

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1 is distributed by ABC, NBC, CBS, FOX, or PBS. For
2 example, if you take WNBC in New York City, which I
3 have labeled here -- in parentheses, the NBC meaning
4 that's the network that it's affiliated with -- WNBC
5 regularly broadcasts the programming provided by the
6 National Broadcasting Company network, the NBC
7 network.

8 That programming would include the regular
9 season and playoff games for the National Basketball
10 Association, the World Series in the upcoming year and
11 other Major League Baseball post-season games. The
12 NFL you would get on WNBC. It's provided by the NBC
13 network. The Today Show, Frasier, Seinfeld, the NBC
14 Nightly News. That's all programming that is
15 distributed by the network to its affiliate WNBC in
16 New York.

17 Much of that same programming, same
18 network programming at least, would be on KNBC in New
19 York. But these affiliates, like WNBC and KNBC, in
20 addition to distributing programming provided by
21 broadcast networks, which is another term we'll use
22 here, also televises some of the programming that they

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1 create -- that is, the station creates -- or
2 programming that they purchase from outside sources.

3 WNBC produces some nightly news show, for
4 example, or it may go out and get reruns of Cheers or
5 some other type of syndicated program, or movies.

6 As you can see from this chart, of the 23
7 stations that the Satellite Carriers were
8 retransmitting at the end of June 1996, 16 of those
9 were network stations. The other seven stations are
10 what is known as superstations. Under Section 119, a
11 superstation is simply an independent television
12 broadcast station. That is, a station that does not
13 carry programming from ABC, NBC, CBS, FOX, or PBS.
14 Superstations produce their own programming. You
15 know, for example, in the case of Atlanta's WTBS,
16 they'll produce a telecast of the Atlanta Braves.

17 They also carry programming that they have
18 acquired from outside sources, like WTBS has a fine
19 movie library from MGM, for example. Many of these
20 stations, again, also produce their own new shows,
21 their own entertainment programming, their own public
22 affairs programming.

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1 Okay. We talked about television
2 broadcast stations which are subject to the compulsory
3 license; the two different types are network stations
4 and superstations. Let me now talk about a term I had
5 used earlier -- cable networks.

6 A cable network is a non-broadcast
7 programming service. It is not licensed by the FCC to
8 any particular community. It does not transmit on any
9 of the frequencies that are used by television
10 broadcast stations. Rather, what happens is is that
11 the cable network places all of this programming
12 directly on satellite, and then it sells that
13 programming that's on satellite either to cable
14 systems or they sell it to the Satellite Carriers, who
15 in turn distribute it to consumers.

16 You cannot receive a cable network over
17 your television set simply with a pair of rabbit ears
18 or sticking up an outdoor antenna. If you wanted to
19 receive cable network programming, you have to pay a
20 subscription television service a monthly fee -- a
21 service such as that provided by the Carriers or cable
22 systems.

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1 Let me give you an example. I should note
2 that that first chart that I used contains information
3 that will be discussed in a little greater detail by
4 one of our witnesses, Mr. Dessler, tomorrow.

5 This chart here is taken from Joint Sports
6 Claimants Exhibit 4, page 9. What it does is it shows
7 a package of programming that is offered by one of the
8 Satellite Carriers. In this case, that carrier is
9 EchoStar. And the name of this programming package is
10 America's Top 40 CD. For the price of \$300 a year, or
11 \$25 a month, EchoStar will sell to you, or anyone
12 else, this package of 40 different channels of
13 programming.

14 We have highlighted the four channels that
15 are television broadcast stations. These are the
16 superstations that I referred to a moment ago. KTLA
17 out of Los Angeles, WGN out of Chicago, WPIX out of
18 New York, TBS or WTBS out of Atlanta, Georgia. So for
19 \$300 a month you get, as part of your service, those
20 four television superstations.

21 This information was taken from the
22 materials that were current as of the time that we

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1 presented our direct case. We understand that since
2 then they have added yet a fifth superstation, which
3 is WSBK out of Boston.

4 Now, the remaining 35 or 36 channels of
5 programming are what we refer to as cable networks,
6 and some of the names may be familiar to you and
7 others may not. Most familiar to me is ESPN, which is
8 a cable network that provides 24 hours a day of sports
9 programming.

10 There are other cable networks here, such
11 as Court TV, TNT, Turner Network Television -- that's
12 another one of the Turner networks -- the USA network,
13 C-SPAN, CNN -- those are what we refer to as cable
14 networks.

15 I should also note that there are two
16 types of cable networks, and we refer to those two
17 types as basic and premium. And when Mr. Trautman
18 testifies later today, he will get into the
19 distinction between those in a little greater detail.
20 But let me just say that all of the cable networks
21 that I was referring to here are generally what we
22 call basic cable networks.

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1 The term comes from the fact that these
2 cable networks were originally developed for use by
3 cable systems, and cable systems would offer them as
4 part of what they would call a basic service, or a
5 basic programming tier. In other words, several
6 different cable networks all being shown together for
7 a single monthly fee.

8 Premium networks are cable networks that
9 are usually offered for a separate monthly fee. You
10 know, maybe \$9.95 a month. Some of the most commonly
11 heard names would be Home Box Office or HBO, or The
12 Movie Channel. Some regional sports networks, like
13 Home Team Sports here in the D.C. area, may be offered
14 as either a premium service. Where I am, I pay like
15 \$10 a month to get it. Sometimes it's offered as part
16 of the basic service. In D.C., for example, you can
17 get Home Team Sports as part of your basic package.

18 One important thing to note here is that
19 when the cable system -- I'm sorry -- when the
20 Satellite Carriers, such as EchoStar, want to put one
21 of these cable networks on their service, when they
22 want to sell the cable network programming to

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1 consumers, they have to go out into the marketplace
2 and they negotiate with the owners of those services.

3 You can't show ESPN unless you sit down
4 with ESPN and say, "All right. This is what I'm
5 willing to pay." And ESPN says, "This is what I'm
6 willing to sell it at." And there's a negotiation
7 that goes on, and ultimately you come out with a
8 price. And the Satellite Carriers engage in free
9 marketplace negotiations for 35 of these 40 channels
10 right here.

11 The price that they end up paying for
12 those cable networks presumably reflects the fair
13 market value that's attached to those cable networks
14 as a result of this face-to-face, hard bargaining
15 negotiations.

16 It is a much different story, however,
17 when it comes to these other four stations, the
18 superstations -- KTLA, WGN, TBS, and WPIX. And there
19 is no negotiating that goes on with respect to those
20 four stations. As I mentioned earlier, there is a
21 compulsory license that the Satellite Carriers have.

22 Satellite Carriers can take those four

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1 stations, and the other 19 that I identified earlier
2 for you, without having to negotiate in the
3 marketplace with us. They have a compulsory license,
4 and the word "compulsory" is critical here.

5 The compulsory nature of the law applies
6 only to the copyright owners. We are compelled to
7 license the programming by any television broadcast
8 station chosen by a carrier. Now, because of this
9 fact, we cannot engage in free market negotiations
10 with the Carriers over a license or any other term.

11 If we don't think that the price the
12 Carriers are now paying is fair, we are simply out of
13 luck. You know, that is why it is so important to us
14 that this panel adopt new rates for Section 119 that
15 reflect fair market value. This is our only
16 opportunity to get compensation that we receive that
17 we consider to be fair.

18 By contrast, the satellite carrier is not
19 compelled to purchase any of the programming on
20 broadcast stations. It is not compelled to purchase
21 any broadcast station in this country at all. The
22 Carriers may pick and choose whatever television

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1 broadcast signals they think are going to maximize
2 their profits.

3 They start with that list of 1,500
4 television broadcast stations in the United States,
5 and they pick the 23 -- at least they are currently
6 picking the 23 -- that they think are most valuable to
7 them. They are free to add or drop those television
8 broadcast stations at any time. They have a complete
9 self-help remedy under the compulsory license. If
10 they don't like the price that this panel sets, they
11 can simply choose fewer stations or they can replace
12 those stations with any of the cable networks that are
13 out there.

14 In addition, besides -- and you'll hear
15 about this from the Satellite Carriers -- there are
16 not only these cable networks here, these 35 or 36,
17 there may be 80, 90, or 100 cable networks out there
18 that they can choose from.

19 All right. We've gone over some of the
20 basic terms that we've used in this proceeding. We're
21 going to keep trying to go over a number of these
22 terms and other terms that will come up when we have

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1 our witnesses testify. But let me now just turn to
2 Section 119, which of course is the law that we are
3 required to apply in this proceeding.

4 Now as you know, the Satellite Home Viewer
5 Act originally became law in 1988. The 1988 act gave
6 the satellite carriers a compulsory license for the
7 first time and set forth the royalty rates the
8 satellite carriers were required to pay.

9 In addition, it authorized an arbitration
10 panel, subject to review by the then Copyright Royalty
11 Tribunal, to adjust the rates that were set in the
12 statute. And that adjustment was to take place and
13 did in fact take place in 1992.

14 The chart on the left here shows the
15 statutory rate adjustment criteria that the
16 arbitration panel was required to apply in the 1992
17 proceeding. As you can see, there were a number of
18 different criteria, all of which the arbitration panel
19 considered to be co-equal.

20 Now, for example, the panel in that case
21 looked at the approximate average cost to a cable
22 system for the right to secondarily transmit to the

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1 public a primary transmission made by a broadcast
2 station. What that means is that they looked at the
3 average royalty payment made by cable systems under
4 the Section 111 compulsory license.

5 There were again a number of other
6 factors. You can see there were criteria such as
7 adopt a rate that maximizes the availability of
8 creative works, reflects the relative role of the
9 copyrighter, all the way down the line.

10 And as you read, and as I'm certain you
11 already have, the 1992 decision of the arbitration
12 panel, you'll see that they went through all of those
13 criteria.

14 In our view, what the arbitration panel
15 did in the 1992 proceeding was they calculated that
16 approximate average cable cost which is an easy number
17 to calculate once you resolve some of the disputes as
18 to what goes in or not. It's an easy number to
19 calculate; the kind of thing that I suspect
20 arbitration panels feel most comfortable in doing.

21 It's a hard number you can look at.
22 That's very simple. They calculated what the average

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1 cable cost was and they ended up adopting a rate, and
2 that was basically the same as the average cable cost.
3 In fairness, they looked at all of the other criteria
4 and they tried to determine how that other criteria
5 would affect the average cable cost.

6 Well, what we got in the last arbitration
7 proceeding was basically the average cable cost. It's
8 fair to say that we were -- that is the copyright
9 owners were disappointed with the result of the 1992
10 decision.

11 However, we understood how the panel
12 arrived at that conclusion, particularly given the
13 language of the 1992 law. And more importantly, we
14 thought that we would have to live with that decision
15 only until 1994. And that is because the original act
16 was scheduled to sunset at the end of 1994, and then
17 we were going to move into a free marketplace; or so
18 we thought.

19 Shortly before the act expired, the
20 carriers once again returned to Congress and began
21 lobbying for a continuation of their compulsory
22 license. Congress ultimately complied and extended

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1 the Section 119 compulsory license until the year
2 2000.

3 As the quid pro quo, however, Congress
4 also authorized this panel to set new Section 119
5 rates for the period July 1997 through the end of
6 1999. It repealed the rate adjustment standards that
7 you see here on your left, the original rate
8 adjustment standards that were in the 1988 act.

9 And it replaced those standards with a new
10 standard. That's the language that you see here on
11 the chart on the right.

12 Let me just emphasize a couple of points
13 about the new Section 119. First, there's only one
14 standard that you must apply, and that is the fair
15 market value standard. In the 1992 rate adjustment
16 proceeding, the arbitration panel there concluded that
17 there were several standards which it had to treat co-
18 equally.

19 Here there is a single standard for you to
20 apply: fair market value. Specifically, it says the
21 rates that you adopt must be those that "most clearly
22 represent the fair market value of" -- use the term --

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1 "secondary transmission." Secondary transmissions is
2 the right that is accorded satellite carriers under
3 Section 119.

4 Very briefly, when WGN puts out its Cubs
5 games in the Chicago area, it is, in parlance of the
6 law, transmitting that programming. When the
7 satellite carrier takes that transmission and puts it
8 up on satellite, it is then retransmitted. It is
9 making a secondary transmission, which then is a term
10 that is defined in the act.

11 There is a primary transmission made by
12 WGN, a secondary transmission made by the satellite
13 carriers and other subscription services as well such
14 as cable television systems. But your job here is
15 simply to determine a royalty fee that most clearly
16 represents the fair market value of the secondary
17 transmissions made by cable operators -- I'm sorry,
18 the satellite carriers.

19 Now the term fair market value has a
20 commonly accepted meaning of the law, and that is the
21 price that we pay to a willing seller by a willing
22 buyer. The House report accompanying the 1994 act

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1 also makes clear that -- and I'm going to quote from
2 a portion of the House committee report which is
3 attached to the testimony of Mr. Olson, Tab A at page
4 nine.

5 "Only one factor" -- this is the House
6 committee report.

7 "Only one factor is to be considered by
8 the arbitrators: fair market value. That value is
9 the rate a willing buyer would pay a willing seller."

10 As we see it, the panel's responsibility
11 in this proceeding is to determine what a willing
12 carrier would pay to willing copyright owners for the
13 right to retransmit super stations, the network
14 stations, the 23 stations that I had identified
15 earlier with all of the programming and all the
16 musical works that went through that programming.

17 Now the new law also says that in
18 determining the fair market value, the panel shall
19 base its decision on economic, competitive, and
20 programming information presented by the parties; and
21 then it lists certain types of information that you
22 are to consider.

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1 Let me just emphasize that there are types
2 of information that the panel must consider in
3 determining fair market value. They are not rate
4 adjustment standards in themselves. The only rate
5 adjustment standard here is fair market value.

6 And information concerning the competitive
7 environment, cost, economic impact, impact on
8 continued availability of programming, those factors,
9 we submit, should be taken account of by you in
10 determining what a willing buyer would pay to a
11 willing seller for the rights that are involved in
12 this proceeding.

13 Let me note one other thing about the
14 difference in the two statutes. And that is the
15 language, the approximate average cost to a cable
16 system, that played such a key role in the 1992
17 proceeding. That language is nowhere to be found in
18 section -- in the new Section 119.

19 The satellite carriers, as you go through
20 their case -- the satellite carriers have approached
21 this proceeding as though nothing has changed with the
22 law. Their focus in their case now, as it was in

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1 1992, was on what cable operators were paying under
2 Section 111.

3 And you'll hear a lot from them about
4 competitive parity and the importance of being able to
5 compete fairly with the cable operators. I appreciate
6 and I recognize and I understand those arguments. But
7 with all due respect, this arbitration panel is not a
8 super FCC, it's not a super FTC.

9 Now your job is not to restore competitive
10 balance into the marketplace to the extent the
11 satellite carriers don't think it exists. Your
12 responsibility, we respectfully submit, is to
13 determine fair market value.

14 And all that information about competition
15 and all that is relevant only insofar as it helps you
16 determine what a willing buyer would pay to a willing
17 seller for the rights at issue here.

18 Now, I am not saying that what cable
19 systems pay under Section 111 is irrelevant because
20 one of the things that the statute talks about here is
21 looking at the cost for similar signals in the
22 compulsory license marketplace. So information about

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1 what cable operators pay certainly has a role in this
2 proceeding.

3 But that statement here about cost for
4 similar signals in similar compulsory license
5 marketplace, that is not the same as average cable
6 cost. Those are two different standards as we see it;
7 two different types of information to look at.

8 And without stealing all the thunder,
9 you'll hear a lot more about that when the satellite
10 carriers put on their direct case and we have an
11 opportunity to go through that case with them.

12 Okay, let me move now to talking about who
13 our 13 witnesses are and the testimony that they will
14 be offering. Now, as I mentioned, each of the
15 copyright owner groups has presented its own direct
16 case. However, we have sought to coordinate our
17 efforts with the objective of minimizing duplicate of
18 testimony.

19 And one thing to just emphasize to the
20 panel is, as I said earlier, there are literally
21 hundreds of copyright owners who have programming at
22 issue here. And we have managed to organize ourselves

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1 over time into seven distinct groups of copyright
2 owners.

3 Each of those groups offers somewhat
4 different types of programming. Each has a somewhat
5 different interest. When we get done with this
6 proceeding, we all must sit down and negotiate among
7 ourselves over how to divide the royalties.

8 The last time it happened, we were all
9 able to come to a settlement among ourselves. But if
10 we don't settle among ourselves, we go through a
11 proceeding just like this. Satellite carriers put
12 their money into the copyright office and they're out
13 of here.

14 We go through one of these rate -- one of
15 these distribution proceedings here every year trying
16 to decide how the funds ought to be allocated. But we
17 all do have separate interests. Each counsel here is
18 attempting to protect its -- the separate interests of
19 its clients.

20 But what we have done, in order to make
21 this proceeding as efficient as possible, is to try to
22 coordinate our direct cases, minimize duplicate to

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1 testimony, and also to ensure that the panel received
2 information of what we believe are five key areas
3 here.

4 First, we will be providing the panel with
5 background information concerning the subscription
6 television industry of which the satellite carriers
7 are a part.

8 Second, we will present testimony
9 concerning the legislative history, and we hope we are
10 going to be presenting testimony concerning the
11 legislative history of the 1994 amendments to the
12 Satellite Home Viewer Act.

13 Third, we will present testimony
14 concerning the satellite carriers themselves.

15 Fourth, we will present testimony
16 concerning the nature of the programming on super
17 stations and network stations.

18 And finally, we will present testimony
19 concerning the cable network marketplace and how we
20 believe the panel should look to the rates paid in the
21 cable network marketplace in setting royalty fees for
22 satellite carriers. And that testimony certainly will

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1 include expert economic analysis of the fair market
2 value of the rights in this case.

3 Now let me in just a little more detail go
4 through each of the areas that we will be presenting
5 evidence on and who our witnesses are. Our first
6 witness today will be Jim Trautman who is with the
7 telecommunications consulting firm of Bortz & Company
8 from Denver, Colorado.

9 Mr. Trautman has provided economic and
10 financial analyses of the communications industry for
11 a wide variety of clients including some of the
12 nation's largest cable operators, cable and broadcast
13 networks, sports leagues, and potential satellite
14 carriers.

15 We've asked Mr. Trautman to provide the
16 panel with a general overview of the cable television
17 and satellite carrier business. And let me emphasize
18 that Mr. Trautman is not here urging you to adopt any
19 particular rate.

20 His job here is simply to provide you with
21 what we believe is helpful background on the different
22 technologies that distribute television programming

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1 such as what those technologies are, the different
2 types of programming they offer, how they market that
3 programming, how they have grown in the past, and what
4 their future prospects appear to be in the next few
5 years.

6 Secondly, Tom Olson, a network witness, is
7 a copyright lawyer who has had a substantial amount of
8 experience on behalf of the network with the Satellite
9 Home Viewer Act. Mr. Olson will discuss the
10 legislative history of the 1994 amendments and in
11 particular how those amendments relate to the 1992
12 rate adjustment decision.

13 Mr. Olson has also provided the panel with
14 a complete set of the legislative materials that
15 accompany the 1994 amendments: the House report, the
16 committee report, the various dialogues back and forth
17 in the congressional record.

18 We believe that those materials and Mr.
19 Olson's testimony will again confirm that there is a
20 single rate adjustment standard here which is the fair
21 market value standard, and he will explain how that
22 particular standard came about.

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1 Okay, next, as we've indicated here,
2 Section 119 requires you to look at impact of your
3 rates -- on the rates that you adopt. In this
4 connection, three of our witnesses will provide the
5 panel with information about the satellite carriers
6 and their business operations.

7 One, Ed Desser. Mr. Desser is head of the
8 venture that licenses the National Basketball
9 Association television rights to the new media. Among
10 other things, Mr. Desser is actually a negotiator from
11 the marketplace with satellite carriers over the sale
12 of our rights in other contexts.

13 We'll also be presenting Mr. Allen Cooper
14 who has had nearly 50 years of experience in the
15 telecommunications research end. He has been with the
16 Motion Picture Association of America for over 20
17 years as it chief communications analyst.

18 Linda McLaughlin is an economist with the
19 National Economic Research Associates. She has had
20 approximately 20 years of experience specializing in
21 the telecommunications industry.

22 Let me just highlight some of the

1 testimony that you will hear from these witnesses.
2 The first thing that we'll tell you is that the
3 carriers in this proceeding are not some obscure mom
4 and pop businesses. Now when you go through their
5 direct case, you'll see names like NetLink or Prime
6 Star or EchoStar, names that may or may not be
7 familiar to you.

8 But the important thing to remember is
9 they are not mom and pop obscure businesses. They are
10 some of the largest domestic and foreign corporations
11 in the world here.

12 Direct TV, one of the satellite carriers,
13 97½% owned by Hughes Electronics which is a subsidiary
14 of General Motors. The remaining 2½% of Direct TV was
15 purchased by AT&T. Price tag: \$137.5 million dollars
16 for a 2½% interest in Direct TV.

17 EchoStar, another satellite carrier,
18 recently agreed to sell a 50% interest of Rupert
19 Murdoch's news corporation. Price tag for that: \$1
20 billion dollars for just a half interest in a DBS
21 operation that is direct broadcast operation with less
22 than a million subscribers at the present time.

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1 ASkyB, a joint venture between Murdoch
2 News Corporation and MCI, MCI paid nearly \$700 million
3 dollars to get its DBS license. PrimeStar, another
4 satellite carrier, owned by six of the nation's
5 largest cable television companies and a General
6 Electric subsidiary.

7 United Video, Southern Satellite, NetLink,
8 all satellite carriers, all owned and controlled by
9 Telecommunications, Inc., TCI, the nation's largest
10 cable operator with \$7 billion dollars in annual
11 revenues, exceeds the gross national product of many
12 small nations around this world.

13 The testimony of these witnesses will also
14 show that there is a significant variation in what the
15 satellite carriers charge consumers to receive network
16 stations and super stations and what they actually
17 pay. Now it will show two things. One is that there
18 is a big variation in the retail prices for what --
19 that they are charging consumers.

20 The one thing, however, that is constant
21 is that the carriers charge a lot more than they pay
22 in Section 119 royalties. By way of example, and this

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1 will come from the testimony of Mr. Desser, one
2 carrier charges \$50 a year for a package of three
3 network signals.

4 Another carrier charges \$35 a year for
5 that package if it's purchased with other programming.
6 The same package is sold by various distributors for
7 prices of \$33, \$20, \$50. In short, the consumer ends
8 up paying anywhere between \$20 and \$50 for those three
9 network stations.

10 The existing Section 119 royalty payments
11 for those stations: \$2.16 for the entire year. Out
12 of that \$50 or out of that \$20, \$2.16 goes to Section
13 119 royalty payments under the existing rate schedule;
14 again, no matter what price the retail price is.

15 One other piece of evidence that I will
16 highlight concerns the aftermath of the 1992 rate
17 adjustment. Now just prior to the 1992 proceeding,
18 the carriers were retransmitting nine network
19 stations. After the network rates were increased,
20 albeit minimally from three to six cents, the carriers
21 began taking even more network signals.

22 To date, the number, as I pointed out, was

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1 16. Even with the three cent rate increase, from nine
2 to 16 network stations being retransmitted. Now the
3 number of subscribers that receive network stations
4 and super stations from satellite carriers has also
5 increased by over 500% during the five years following
6 the 1992 rate adjustment.

7 And while the total Section 119 royalty
8 fund has likewise -- has increased over the years, the
9 extent of the carrier's exploitation of the
10 copyrighted programming has increased dramatically as
11 there is more and more households out there that are
12 receiving broadcast station programming that we --
13 pursuant to the Section 119 compulsory license.

14 Section 119 specifically references
15 programming information as another type of information
16 that you should consider. We are presenting testimony
17 that describes the programming which appears on the
18 super stations and network stations. We have six
19 witnesses who will be describing that type of -- that
20 programming.

21 Again, Mr. Desser on behalf of the Joint
22 Sports Claimants, will talk about the sports

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1 programming. Marsha Kessler of the Motion Picture
2 Association of America will talk about the series and
3 the movies, the syndicated shows that appear on those.

4 Other witnesses include Alan Sternfield
5 from ABC Entertainment to talk about the types of
6 programming that the networks provide; John Wilson of
7 the Public Broadcasting Service will talk about the
8 public television programming and the signals
9 retransmitted via 119.

10 William Graff of Station WPIX which is one
11 of the super stations; and finally, David Hummel on
12 behalf of the Devotional Claimants. This testimony
13 will certainly demonstrate the wide variety of
14 copyrighted programming that the satellite carriers
15 are able to profit from under Section 119.

16 There's one other point that we believe
17 will emerge from the testimony of many of these
18 witnesses, and that is the importance of exclusivity.
19 Now when copyright owners sell their programming in
20 the free marketplace, they frequently grant exclusive
21 rights.

22 Now by contract, they're also able to

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1 ensure that one licensee does not violate the
2 exclusivity granted to another licensee. Satellite
3 carriers, on the other hand, don't play by those
4 rules. They take our programming without any
5 obligation to honor the exclusivity that we have
6 granted to others.

7 This, in the language of Section 119, is
8 a special feature, a condition, of the retransmission
9 marketplace that you should also take into account.
10 And Mr. Desser will talk from the sports end about the
11 importance of exclusivity and how the -- some of these
12 arrangements violate that exclusivity.

13 As I had mentioned at the outset, the
14 Section 119 rates that we are proposing have their
15 basis in the cable network license fees. Section 119
16 also says that the panel, in determining fair market
17 value, should look at those fees. It talks about
18 similar signals in similar private marketplaces.

19 We have four witnesses who will discuss
20 the cable network marketplace. Ms. McLaughlin, who I
21 identified earlier; Dr. Robert Crandall, who is an
22 economist with the Brookings Institution and who

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1 specialized for about three decades in the
2 telecommunications industry.

3 Third, Dr. Bruce Owen is a visiting
4 professor of economics at Stanford and head of the
5 economic consulting -- head of an economic consulting
6 firm who also specializes in the telecommunications
7 industry.

8 And fourth, Mr. Larry Gerbrandt who is a
9 media analyst and programming appraiser with Paul
10 Kagan Associates which routinely collect information
11 and publish that information about what is being paid
12 for cable network programming among a variety of other
13 things.

14 And these witnesses will provide
15 considerable information about the license fees that
16 are paid for cable network programming and how those
17 fees relate to the fair market value of the
18 programming at issue or the rights that are at issue
19 in this case.

20 The evidence that they will present is
21 going to show that there are a number of cable
22 networks and that these cable networks charge license

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1 fees of anywhere from a few cents per subscriber per
2 month to a few dollars or several dollars per
3 subscriber per month.

4 Most of these networks will be designed to
5 appeal to niche audiences like ESPN sports
6 programming. They present specialized programming
7 that is particularly attractive to one segment of the
8 total audience. There are, however, these two cable
9 networks that are designed just like broadcast
10 stations: TNT and USA network.

11 Both USA and TNT offer a variety of
12 programming that is intended to appeal to the widest
13 possible audience, just like the broadcast station.
14 They present some sports programming, some older
15 movies, some newer movies, some older and some newer
16 series programs, some original and some first run
17 programming.

18 Both TNT and USA are designed to have the
19 look and the feel of television broadcast stations.
20 There is, however, a major difference between TNT and
21 USA on the one hand and the television broadcast
22 stations that are being retransmitted pursuant to

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1 Section 119 on the other hand, and that is in the
2 price that the satellite carriers pay for those
3 programming services.

4 This is taken from a chart -- the chart
5 that I've put up is taken from the testimony of Mr.
6 Gerbrandt here who has additional information to share
7 with you as well. The straight black lines that you
8 see on this chart are the royalty rates that are
9 established currently, or they were established back
10 in 1992 by the arbitration panel.

11 You can see the price for certain super
12 stations is either the 14 cents or 17½ cents per
13 subscriber per month. The price for network stations
14 was set in that proceeding at six cents per subscriber
15 per month.

16 In contrast, you can see this blue line
17 here represents the license fees that are charged for
18 USA network. The -- I guess that's red is --
19 represents the license fees that were charged for --
20 or are being charged for TNT. And then during the
21 period 1992 through 1999.

22 And obviously the numbers for '98 and 1999

1 are estimates that are made by Mr. Gerbrandt, and
2 he'll explain how he arrived at those estimates. Then
3 what you'll see is that the USA network price started
4 out close but a little bit higher than the highest
5 super station rate that was set in the 1992
6 proceeding.

7 It has continually gone up, and our
8 projection is that it will continue to go up over the
9 next two and a half years that your rates will be in
10 effect. It started out at about 22 cents, risen to
11 the level of 35 cents in 1997, and is projected to go
12 to 38 cents in the year 1999.

13 TNT was receiving in 1992 about 40 cents
14 per subscriber per month. The comparable fee in 1999
15 will be about 50 cents. Now, the important thing to
16 remember here is that the fees that are paid for USA
17 and TNT are the product of actual marketplace
18 negotiations.

19 They reflect the price that a willing
20 buyer pays to a willing seller for a programming
21 service that is designed like a television broadcast
22 station. And when you look at those marketplace fees,

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1 what you see is that they are substantially higher
2 than the existing Section 119 royalties.

3 Remember, under the current -- under the
4 current Section 119 royalty schedule, a satellite
5 carrier pays six cents a subscriber a month for a
6 network station. And on network stations, you get
7 sports programming, World Series, Super Bowl. You get
8 the NBA basketball tournament tonight, over the next
9 two weeks.

10 You get NFL football. You get news and
11 public affairs programming such as 60 Minutes,
12 Dateline, PrimeTime Live, several daily newscasts.
13 You get first run entertainment programming such as
14 Seinfeld, Frazier, ER, Cosby, Home Improvement, Spin
15 City; late night programming such as Nightline, The
16 Late Show With David Letterman, The Tonight Show With
17 Jay Leno; children's programming.

18 You get PBS programming such as Sesame
19 Street, The News Hour With Jim Lehrer. Those are all
20 the kinds of programs that you get and the satellite
21 carriers get to retransmit at the rate of six cents
22 per network station.

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1 And what you get from the marketplace for
2 the programming on just a USA network which has a lot
3 of programming -- I don't mean to denigrate any of it
4 because a lot of it is very fine programming, but it's
5 probably not a whole lot of programming that many
6 people are familiar with.

7 The license fee there is going to be 35
8 cents in 1997, 36 cents in 1998, and 38 cents in 1999.
9 And as I told you at the outset, there are many, many
10 cable networks that are out there. Mr. Gerbrandt will
11 talk about and you'll hear testimony about a lot of
12 those different cable networks.

13 These are the two that we think happen to
14 be most closely analogous to broadcast signals because
15 they share the same mission: to present a broad
16 variety of programming. They're two of the few
17 networks that contain sports programming, for example,
18 in addition to a broad variety of programming.

19 I think another thing that you will notice
20 when you look at this chart is not only a big gap
21 between Section 119 fees and the fees that are being
22 negotiated out of the marketplace for similar types of

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1 signals, you'll also see that those fees in the
2 marketplace have steadily risen over the last several
3 years and will continue to rise.

4 This fact is underscored by the testimony
5 of Ms. McLaughlin, the economist who's being presented
6 by the Broadcasting Service. She focuses upon the 12
7 most widely carried cable networks.

8 In 1992, those 12 most widely carried
9 networks all had average license fees that were very
10 close to the highest rate charged for super stations.
11 The average of those 12 was 18 cents. The highest
12 Section 119 rate was 17.5 cents.

13 What her testimony will show is that
14 during that period, 1992 through 1999, those average
15 rates for the 12 most popular cable networks has
16 increased by approximately -- it's 50% higher so that
17 the rate is now an average for those 12 between 26 and
18 28 cents for that period of 1997 through 1999.

19 Dr. Owen, who is an economist that the
20 Networks will be presenting, provides a somewhat
21 different, but nevertheless a related, perspective on
22 the cable network marketplace. Dr. Owen has conducted

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1 a regression analysis which focuses upon the license
2 fees paid for nearly 30 cable networks during a period
3 of five years.

4 Dr. Owen's analysis shows that there is a
5 very high correlation between a cable network's
6 license fee and the amount that it pays for
7 programming. During the five year period studied by
8 Dr. Owen, the USA network spent on average anywhere
9 from \$200 to \$260 million dollars per year for its
10 programming.

11 The comparable expenditure for TNT was
12 \$420 million dollars. The average expenditure for all
13 of the cable -- and you're looking at about 30-odd
14 cable networks. The average expenditure for all 30 of
15 those was \$81 million dollars.

16 On the other hand, three of the commercial
17 broadcast networks, ABC, CBS, NBC spent anywhere from
18 \$1.6 to \$2 billion dollars per year for the
19 programming to acquire the rights of the programming,
20 to produce the programming that the satellite carriers
21 are willing to transmit pursuant to the Section 119
22 compulsory license.

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1 Dr. Owen's analysis shows that the license
2 fee for just the network programming on network
3 stations would be approximately \$1.22 which, of
4 course, is higher than the USA and TNT license fees.
5 It's actually below the fees that are charged for any
6 of the premium cable networks such as HBO movie
7 channel.

8 I can just wrap up at this point here.

9 We welcome the opportunity to have this
10 rate adjustment proceeding. Like I said, it's our
11 only chance to get what we consider to be fair market
12 compensation for our programming. And we are very
13 pleased to have you as arbitrators to decide this
14 case.

15 But the fact of the matter is, we really
16 don't want to be here. It's nothing personal. We
17 would prefer to go into the marketplace and sell our
18 programming to the satellite carriers. We would
19 prefer that the satellite carriers go into the
20 marketplace and buy our programming just as they go
21 out and buy all of the programming from these cable
22 networks.

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1 The reason we feel that way is because we
2 would be certain that we would be receiving fair
3 market value. We would receive the price that is
4 negotiated on between a willing buyer and a willing
5 seller.

6 The carriers don't want to negotiate in
7 that free marketplace setting without a compulsory
8 license hanging over our head here. They are the ones
9 who want this compulsory license. They are the ones
10 who want to have a government body or arbitration
11 panel setting the rates as opposed to being out there
12 in a free marketplace.

13 And the thing that is probably most
14 frustrating for most copyright owners is that when we
15 go up on the Hill and talk to the folks in Congress
16 about this compulsory license, we're met with
17 satellite carriers who come in and say how valuable
18 that programming is to their subscriber, how important
19 it is to the service that they provide.

20 Hundreds -- scores of cable networks that
21 are out there, all of that programming that's out
22 there, they want a compulsory license for just

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1 television broadcast stations because it's valuable to
2 them.

3 So valuable that they need an act of
4 Congress, like there's nothing else better for
5 Congress to do than to go out and spend time deciding
6 what television programming people should receive
7 pursuant to compulsory license and what they should
8 receive in free marketplace negotiations.

9 And when they get up on the Hill, they
10 tell Congress the things that you will find here. For
11 example, the testimony of Mr. Chuck Hewitt, the
12 president of the Satellite Broadcasting Communications
13 Association, which is included in the direct case of
14 the carriers.

15 And we cannot emphasize -- this is Mr.
16 Hewitt talking.

17 "We cannot overemphasize the importance of
18 network signals to rural America. There have been many
19 estimates of the millions of homes that do not have
20 access to these network signals, and we believe that
21 we are providing a vital service to those homes that
22 do not have access by providing critical

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1 communications information and entertainment to rural
2 America."

3 Mr. Hewitt is not testifying in this
4 proceeding here. Instead, we'll have consultants who
5 they will bring in and will tell you that our
6 programming isn't really all that valuable. They'll
7 talk about all the other cable network programming,
8 they'll talk about ratings, they'll talk about things
9 that say look, we shouldn't have to be paying any more
10 than what cable operators pay.

11 It's a very different story in this
12 proceeding than what we get up on the Hill. Our
13 belief is that the SBCA and Mr. Hewitt, they were
14 right the first time. This is valuable programming.
15 And we believe that we should get a royalty rate that
16 reflects how valuable that programming is.

17 And that rate is substantially above the
18 rate that currently exists in the law or as a result
19 of the 1992 arbitration. The copyright owners will be
20 proposing a rate of -- for super stations of 35 cents
21 for the second half of the year 1997, and 36 cents for
22 1998, and 38 cents for 1999.

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1 That's cents per subscriber per month, a
2 rate that is set for super stations right about where
3 the USA network rate is. With the exception of the
4 Networks, other copyright owners will also be
5 proposing a royalty rate -- same royalty rate for
6 network stations: 35, 36, and 38 cents.

7 The Networks will -- as I mentioned
8 earlier, have a study that supports the rate of at
9 least \$1.22 per subscriber per month. The other
10 copyright owners are happy with the 35, 36, 38 cent
11 rate for network stations. Obviously we'd be even
12 happier with \$1.22.

13 However you look at it though, we believe
14 that the rate, consistent with what has gone on in the
15 cable network marketplace, should be increased
16 significantly.

17 I thank you for your time.

18 CHAIRMAN GRIFFITH: Mr. Garrett, thank
19 you, sir.

20 It's just about time for our morning
21 recess. About ten minutes. However, indulge us. We
22 are going to discuss a couple of the issues which have

1 come up this morning. But I anticipate it won't take
2 much longer than ten minutes hopefully.

3 All right, we'll take our recess.

4 (Whereupon, the foregoing matter went off
5 the record at 11:26 a.m. and went back on
6 the record at 11:45 a.m.)

7 CHAIRMAN GRIFFITH: Wait just one minute,
8 Mr. Garrett. Mr. Glist, just so that we are perfectly
9 clear, what is -- what specific is the motion that you
10 wanted us to reconsider? Just tell us one time. The
11 Music Claimants, the --

12 MR. GLIST: The motion that I was trying
13 to make and that has been characterized as one for
14 reconsideration is to exclude the incorporated
15 testimony of those individuals who are not here and
16 have no sponsoring witness.

17 CHAIRMAN GRIFFITH: Right, okay.

18 Are you referencing the ruling that was
19 made by the order which was entered on February 12,
20 1997 which was ordered by Marybeth Peters to register
21 the copyrights by William J. Roberts, Jr., the senior
22 attorney?

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1 MS. WOODS: Your Honor, I believe that's
2 the order we're referencing.

3 JUDGE GULIN: Identify yourself, please.

4 MS. WOODS: Oh, excuse me. Michelle Woods
5 for Public Television.

6 That was the order in which the discovery
7 disputes - discovery motions were dissolved, and that
8 is the one we are referencing.

9 MR. GLIST: That would be the one.

10 CHAIRMAN GRIFFITH: That is the one?

11 MR. GLIST: Yes, sir.

12 CHAIRMAN GRIFFITH: There are numbered.
13 We have different rulings, and we were going to --
14 just taking a brief look at it again. But your
15 reference is to those incidents, or instances rather,
16 in which there is reference to testimony which is not
17 going to be supported by a witness or individuals have
18 incorporated prior testimony?

19 MR. GLIST: Your Honor, to be specific, --

20 CHAIRMAN GRIFFITH: Please.

21 MR. GLIST: -- PBS has incorporated the
22 testimony of Sharon, Rockefeller, Matthais, Robert,

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1 Sieber. MPAA has incorporated testimony by Mr. Mr.
2 Valenti, Attaway, Silberman, and Kryle.

3 CHAIRMAN GRIFFITH: Yes.

4 MR. GLIST: None of those individuals are
5 here to sponsor, none of them are here to cross
6 examine. There is no other witness who is subjecting
7 themselves to cross examination on any of the
8 statements contained therein. That is the subject of
9 the motion.

10 The closest that I can see that it has
11 been dealt with in the order which Ms. Woods referred
12 to is on page five.

13 MR. GARRETT: Five, yes. And that was
14 under the motion to strike written direct case of the
15 Music Claimants which is on page four.

16 MR. LANE: Excuse me, Your Honor; Dennis
17 Lane for Program Suppliers.

18 I think the motion is -- actually starts
19 on page five and the ruling is on page seven.

20 CHAIRMAN GRIFFITH: Okay.

21 MR. LANE: There is a ruling on page seven
22 that refers to the rule itself under which we

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1 incorporated the prior testimony.

2 CHAIRMAN GRIFFITH: Okay.

3 MR. GLIST: That is correct.

4 CHAIRMAN GRIFFITH: Thank you. We'll
5 consider that matter at lunch.

6 Mr. Garrett, we wanted to ask you just
7 since we are trying to work these considerations and
8 determinations of these motions in from time to time
9 when you anticipate you will be calling Mr. Olson.

10 MR. GARRETT: Mr. Olson will be called by
11 the Networks, Your Honor.

12 CHAIRMAN GRIFFITH: Oh, that's --

13 MR. OSSOLA: Your Honor, Charles Ossola
14 for the Networks. We anticipate Monday -- Monday
15 morning.

16 CHAIRMAN GRIFFITH: Monday morning?

17 MR. OSSOLA: Yes, sir.

18 CHAIRMAN GRIFFITH: Okay. Because we were
19 told that you were going to call Mr. Trautman and then
20 Dessler, is that correct?

21 MR. GARRETT: Yes, Your Honor. Mr.
22 Trautman is here to testify today and Mr. Dessler will

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1 be available tomorrow.

2 CHAIRMAN GRIFFITH: Okay. And then we
3 anticipate Monday morning with Mr. Olson?

4 MR. OSSOLA: Yes, sir.

5 CHAIRMAN GRIFFITH: Okay. Anything else?
6 Okay, all right.

7 Yes?

8 MR. GARRETT: Your Honor, Bob Garrett for
9 the Joint Sports Claimants.

10 It was pointed out to me during the break
11 that I had misspoke on two occasions, which is
12 actually better than my usual track record, and I just
13 wanted to correct the record.

14 First of all, the Satellite Carriers --
15 that I had said that the EchoStar package was sold for
16 a price of \$300 a month. It was actually \$300 a year.
17 It may seem like \$300 a month.

18 And secondly, at the end of my opening
19 statement, I had identified testimony from Mr. Hewitt
20 as being included in the Satellite Carriers' direct
21 case. It's actually included within the Networks'
22 direct case, and it's actually an attachment to the

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1 statement that the Networks had filed.

2 I apologize for the confusion. I know if
3 there are other misstatements that Mr. Glist will
4 certainly point them out.

5 CHAIRMAN GRIFFITH: The record is so
6 amended.

7 All right, prepare to proceed.

8 MR. OSSOLA: Your Honor, if I may, Charles
9 Ossola for the Commercial Networks.

10 Before Mr. Glist begins, I would just
11 simply like to clarify something. We would intend to
12 present an opening statement that would -- if we do
13 so, and frankly we wanted to hear Mr. Garrett's first
14 which was generally covering all the complainants --
15 prior to the introduction of our first witness, Mr.
16 Olson, which will be on Monday.

17 I think that's logical and sensible. And
18 with these two gentlemen providing the overview, I
19 think, of both sides, when we present our first
20 witness for the Commercial Networks, we will then
21 emphasize the points that we are going to be
22 emphasizing.

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1 CHAIRMAN GRIFFITH: All right, thank you.

2 MS. CLEARY: Your Honor, Jacqueline Cleary
3 for American Sky Broadcasting.

4 It's our understanding, based on the rules
5 of the -- opening statement at the commencement of
6 their witnesses' testimony and I just want to note for
7 the record that American Sky Broadcasting also intends
8 to present a separate opening statement at the
9 commencement of the testimony.

10 CHAIRMAN GRIFFITH: On April the 15th?

11 MS. CLEARY: April the 16th, I believe.

12 CHAIRMAN GRIFFITH: Sixteenth, whenever it
13 is.

14 Okay, PBS?

15 MS. WOODS: Your Honor, I was just going
16 to say that we -- Michelle Woods for Public
17 Television. We also expect to have an opening
18 statement.

19 CHAIRMAN GRIFFITH: All right, we
20 understand. Mr. Glist?

21 MR. GLIST: Thank you, Your Honor.

22 My name is Paul Glist. I'm with Cole,

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1 Raywid & Braverman and with John Siever and Mr. Paul.
2 We are representing the Satellite Broadcast
3 Communications Association and the Satellite Carriers
4 in this case.

5 And I'm thankful for Mr. Garrett's
6 flattering appraisal of the financial weight that we
7 bring to this proceeding, but I don't feel much like
8 a giant in this room, to be honest. Seems to me that
9 Disney and ABC and CBS and NBC and all the sports
10 leagues and PBS and NAB and Music -- and I've probably
11 forgotten a few -- have all arisen against the
12 Satellite Carriers in our own efforts to try to strike
13 a cord of reason in this proceeding.

14 I think what would be most helpful because
15 the vocabulary has been laid out is for me to give you
16 at the outset a little bit of a history that I think
17 will animate your thinking about the evidence that
18 you're about to hear because there really is a common
19 theme in copyright history.

20 And at least to me, it seems that those
21 who are entrenched in a particular current technology
22 have a hostility and then a deep ambivalence about new

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1 technology that arises on the scene. What happens
2 routinely in this cycle is that copyright owners
3 resist; and then, after they reconcile themselves to
4 the existence of a new technology, they try to profit
5 off of new technologies in which they have not
6 invested.

7 In cable television, this began in the
8 1960's. And this will all be animated in brief at the
9 end of this case. But in the 1960's, the networks
10 began a litigation campaign to stop cable television
11 systems from retransmitting broadcast signals to
12 subscribers of those systems.

13 And the U.S. Supreme Court in 1968 in the
14 Fortnightly case said no; they ruled against the
15 networks. They held for cable. And they said that
16 cable television should best be viewed under the law
17 that existed then which was the 1909 Act, as doing
18 nothing more than acting as a viewer's antenna, adding
19 clarity to that which was already bought and paid for
20 and in the air.

21 And the same result occurred in the later
22 Supreme Court case with more distant broadcast signals

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1 being carried on cable. But this is Washington, and
2 that was merely the Supreme Court. And there was an
3 immediate regulatory backlash.

4 The FCC was prevailed upon by many of the
5 industries on the other side of this room to put a
6 freeze on the cable industry until cable cried uncle.
7 And cable cried uncle in a deal where they agreed to
8 go back to the Hill and come into a royalty
9 arrangement in which the compulsory license under
10 Section 111 would be adopted as law.

11 Now, the reason that that compulsory
12 license was the chosen mechanism -- because at that
13 time, and today, there was no mechanism in the real
14 world to clear the entire broadcast day of the
15 broadcast signals that were being picked up by cable
16 and carried over to their customers.

17 The rights that the broadcast stations
18 acquire -- they're subdivided along -- the
19 broadcasters get one time right to retransmit free
20 over the air for a particular package. The packages
21 change all the time.

22 And all of the parties, both sides of the

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1 room, recognized at the time that neither the network,
2 nor sports, nor MPAA, nor anybody else out there,
3 including the broadcast station, was in a position to
4 actually clear the retransmission of that signal.

5 And so the license was adopted by Congress
6 as that clearance mechanism. In a sense, in a very
7 real sense, the copyright owners are as dependent on
8 compulsory licenses as our cable operators and
9 satellite carriers. It was true then; it's true today.

10 And I could quote their executives from
11 testimony, but we can do that in brief. There's no
12 need to open with that.

13 Now, taking cable as a model, because
14 historically that's where we were, let's see how the
15 super station actually works. A station like WTBS in
16 Atlanta buys programming in the marketplace and then
17 somebody else, a carrier, picks up that signal off the
18 air and uplinks it to satellite.

19 Okay, they buy a facility to receive the
20 signal and transmit it up the satellite. And then it
21 is downlinked to receiving stations on the ground.
22 Well, you can do that in the clear and no one will

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1 ever pay for the service of carrying that signal.

2 And so in order to make sure that those
3 who pay for the service are those who get the service,
4 that signal is scrambled and then there is an
5 authorization sequence where data streams come down
6 with the satellite signal and they turn on and off
7 electronics on the ground in order to make sure that
8 only paying customers get that signal.

9 And then from a cable head end, which is
10 the central receiving facility of a cable system, it
11 goes out to customers as part of a package like basic
12 or expanded basic. If any of you are cable
13 subscribers, you're familiar with those generic terms.

14 So the cable compulsory license lets cable
15 operators pay money into a royalty pool here in this
16 building and then it is divided up, as Mr. Garrett
17 explained to you, in distribution proceedings.

18 Section 111 has a series of formulas under
19 which the cable television industry pays today about
20 \$175 million dollars for the 62 million households
21 that it serves. And this license has been around for
22 long enough so that the private market transactions

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1 that are going on around this are structured with full
2 knowledge of that license.

3 So, for example, WTBS actually substitutes
4 national advertising spots in the uplinked signal, and
5 they sell that time to national advertisers who want
6 to get distributed in the cable and satellite
7 business. Warner Brothers, the WB network that is up
8 and coming, they affiliated with another super
9 station, WGN, because they said that's a way of
10 getting national distribution through the licensing
11 mechanism.

12 Section 111 is applied to every multi
13 channel provider with one exception. It's applied to
14 cable. It's applied to private cable, sometimes known
15 as satellite master antenna. These are the cable
16 systems that serve big apartment complexes,
17 condominiums, or private developments.

18 It's applied to wireless cable, sometimes
19 known as MMDS or multi-channel microwave distribution
20 service. It's applied to telephone companies that go
21 into the cable business like Ameritech or Southern New
22 England Telephone.

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1 But it doesn't apply to satellite carriers
2 selling directly to individual customers who have a
3 dish at their home, and there's a reason for that.
4 The reason is we encountered the same cycle of
5 resistance that cable encountered. It started after
6 the carriers scrambled their signals in order to
7 protect it.

8 Congress changed the laws to motivate them
9 to scramble their signals. And as they went through
10 the process of authorizing dishes on the ground to
11 receive an unscrambled signal, the Copyright Office
12 opined that that was illegal, that it did not fit
13 within the 111 license they applied to cable systems.

14 And again, the networks stepped in, as
15 we'll -- NBC sued to stop it in 1988, I believe. And
16 they were successful at the District Court level, and
17 they failed on appeal. The 11th Circuit said that the
18 satellite carriers were acting like a cable system in
19 the sky, that they built their head end not on the
20 ground but in geostationary orbit.

21 But this is Washington, and that was just
22 a court. And there was a stand off again between the

1 Copyright Office which said we don't recognize the
2 jurisdiction of the 11th Circuit to bind our views.
3 And Congress cut through this mess by passing Section
4 119 in 1988.

5 119 is the same kind of streamlined
6 royalty arrangement modeled largely on the Section 111
7 license that applies to everyone else. Satellite
8 carriers come in two flavors. One is C-band,
9 sometimes known as home satellite dish or HSD.

10 Those are the big dishes that you see out
11 on rural routes that people installed in the late
12 80's, maybe in the early 90's, and there are a couple
13 million of them out there. It's a big dish because
14 it's receiving a particular frequency off the
15 satellite. It's the same frequency that goes to cable
16 head ends, and that's engineered to go to big dishes.

17 But the second flavor is Ku-band, also
18 known as direct broadcast satellite or DBS. And what
19 DBS does is a very unique trick. They collect cable
20 network signals, broadcast signals; they package them
21 together at -- they take them down off satellite or
22 off the air; they patch them together at a new uplink

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1 facility; and they send them up to a satellite that is
2 transmitting at a higher power.

3 And the way frequencies work is if they're
4 coming out of the sky with a higher power, you can hit
5 a smaller dish and that signal comes in with digital
6 quality. Well, you shrink the dish, and the
7 popularity goes up. And that's what has happened with
8 direct broadcast satellite.

9 And the royalties under the Section 119
10 license began to climb dramatically because they grow
11 on a unit basis with every customer that you add. I
12 think according to Mr. Roberts, the estimate that he
13 gave to an ABA subcommittee a week or two ago, the
14 royalties are in the \$25 to \$35 million dollar range
15 under the 119 license given the -- where we are with
16 DBS.

17 But 119 does invite occasional adjustments
18 to the rate like this proceeding that we're in right
19 now. And this proceeding is going to illustrate the
20 very different expectations of the parties to this
21 process.

22 Now, we're going to be coming to you with

1 a very streamlined case. We have three witnesses:
2 Mr. Parker, who is an executive with one of the
3 satellite carriers; and two experts, Harry Shooshan,
4 known in the city as Chip Shooshan, and John Haring.

5 And as with just about any expert that you
6 would expect to show up in a proceeding like this,
7 they have battled issues like this at the FCC and
8 Congress, at the Copyright Office, in distribution.

9 And they're veterans of -- they're
10 veterans of this industry, and you can measure their
11 qualifications in decades and tonnage of reports just
12 like everyone on the other side. That's conventional
13 in Washington.

14 I'm not going to summarize their
15 testimony. What I want to do is identify for you the
16 common themes that we are trying to develop through
17 that testimony so you'll understand where I'm trying
18 to go. It will all tie back to testimony, but at
19 least you'll know what I'm trying to do.

20 Number one, fundamental number one, DBS is
21 the most promising competitor to cable television that
22 we have going. But it is still the David to cable's

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1 Goliath. According to the FCC's most recent report
2 which came out January 4th this year, this carrier
3 industry has about 8% of the market of multi-channel
4 video programming.

5 And in fact, Congress and the FCC have
6 shaped much of their laws to permit DBS to develop
7 into this viable competitor. If you get into the
8 arcania of cable television regulation, for example,
9 you'll find that the FCC looks to DBS as one of the
10 elements for creating effective competition to cable
11 operators.

12 Fundamental number two is that DBS is the
13 only one among all of the competing parties to be
14 excluded from Section 111. But we do not believe that
15 that is a reason to settle it with royalties that are
16 grossly disproportionate to all other multi-channel
17 providers in the country.

18 The others can take down ABC, CBS, NBC off
19 of a local station and they pay nothing. If they take
20 a distant feed -- you know, a station that's out of
21 market, they will pay something on the order of two to
22 three cents. If they take an independent, they will

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1 pay something on the order of a dime.

2 Fundamental number three, the satellite
3 carriers have a very different view than the copyright
4 owners about what provides value to our customers. I
5 will be the first to admit to you that the two sides
6 of this room are dependent on each other. The
7 copyright owners have nothing if they cannot reach
8 customers.

9 And that's why the broadcast networks pay
10 television affiliate stations money to air the network
11 programming, that they have to get it out into the
12 audience and not vice versa. But our satellite
13 carriers also need content, right?

14 We have to have something to send. So
15 there's a mutual dependency in this room that I don't
16 think anyone can deny. But broadcast signals, they
17 are just a sliver of what satellite carriers have to
18 offer to their customers.

19 We're not just picking up somebody else's
20 broadcast signal and delivering it to a customer and
21 pocketing money. That's not what we're doing.

22 Number one, whatever it is that we are

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1 delivering, whether it's broadcast or CableNet or
2 premium service, pay-per-view, it's coming with
3 absolute digital quality. And that applies as well to
4 a broadcast signal that is coming in our package.

5 The second thing is that what we're
6 providing is a package of choice for our customers a
7 hundred or more cable networks like or better than the
8 cable industry. The copyright owners are either under
9 the illusion or creating the illusion that our
10 customers are just buying our service to get broadcast
11 signals, and I think that that's just not true.

12 A few moments reflection on why cable
13 television subscribers buy packages of cable networks
14 instead of just the basic broadcast service should
15 serve to disabuse all of us of the notion that all
16 we're doing is delivering broadcast signals to our
17 customers.

18 And we're delivering a lot more to our
19 customers. We have state of the art program guides,
20 the electronic program guides that are unrivaled in
21 any other multi-channel technology. And that's not to
22 mention the effort behind the scenes, stuff that the

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1 customer doesn't even necessarily see.

2 The scrambling and descrambling process is
3 a complicated process organized in an uplink center.
4 The distribution and retailing of dishes is a
5 complicated effort. The marketing that goes into this
6 business. We call ourselves carriers for the
7 convenience of identification in this proceeding, but
8 we're not just picking up a broadcast signal, throwing
9 it in the back of a truck and dumping it in rural
10 America. We're delivering a lot more than that.

11 Fundamental number four, it's these
12 carriers that have made all the investment to make
13 this distribution system work. They are the ones who
14 took the risk. And I'll tell you, they are proud of
15 the fact that they are growing; but they are also well
16 aware of the fact that the analysts are telling them
17 that the field is too crowded and some among them will
18 perish. That's risk.

19 Fundamental number five, the copyright
20 owners at a very basic level are seeking to profit
21 from every competitor in this business without making
22 an incremental investment, without taking any risk.

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1 Now, we don't begrudge them what they get from cable
2 or telephone or MMDS or SMATV's.

3 But to increase the price to us of a
4 network signal from six cents to \$1.22 and the price
5 of a super station from 14 or 17½ cents where it is
6 today to 38 cents would increase today's royalty pool
7 from \$30 million to \$250 million dollars a year which
8 is more than the entire cable television industry pays
9 to them for the 62 million households that cable pays.

10 Now, for that kind of return, someone
11 needs to put money at risk. And these guys all know
12 how to put money at risk when they want to. Many of
13 them own the CableNets that they pointed to on the
14 chart. They know how to get into this business.

15 But without that investment, I think that
16 efforts to increase their share at the scale post
17 should be created skeptically. There's another way
18 that they know how to get into this business and put
19 some money at risk. That's by getting into the
20 carriage business itself.

21 You might notice that the so-called
22 commercial networks that Mr. Ossola is representing

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1 are identified as ABC, CBS, and NBC. Well, where is
2 Fox? Fox has invested in ASkyB. What side of the
3 aisle are they on? On the side of the risk takers.

4 Now the carriers -- and this is
5 fundamental number six. Fundamentally -- I'm going to
6 level with you. We do not believe that there is any
7 single number that is the perfect number. And indeed,
8 when we filed our case, we said that. We said there's
9 a range of reasonableness.

10 We're going to identify what we think the
11 extremes are, and then this panel has authority to
12 choose within that range. But the Copyright Office,
13 under the beauty of the regulations that you've seen
14 me struggling with, forced us to say huh-uh, choose a
15 perfect number; and so we did.

16 We amended our case and chose a perfect
17 number. But I'm going to tell you there is no
18 perfection in a single number. That's our real
19 position, just so you know.

20 Now, let me talk about the law and a
21 little bit about how the colleagues on the other side
22 of the aisle are trying to squeeze their position into

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1 the law. You know, fundamentally, I don't think that
2 this is really a battle over statutory interpretation.

3 Although, the copyright owners would want
4 you to believe that, and I know every party in this
5 proceeding is going to brief it to death. But when
6 you look at the origin of 119 emerging as it did out
7 of the cable license, when you look at the numbers
8 that were initially adopted in 1988, twelve cents for
9 an independent, three cents for a network, you will
10 see a stamp on that straight from the cable compulsory
11 license.

12 That ratio of 12 to 3, of 4 to 1, is no
13 accident. That's the ratio between independents and
14 networks in the cable compulsory license. And even
15 though the last CARP made some adjustments, the
16 network signals today are still valued for royalty
17 purposes at less than half of an independent.

18 Why would that be? When 111 was crafted
19 and when 119 was first crafted, it reflected the sense
20 that the networks were obtaining programming for
21 national distribution already that the market had
22 already adjusted for distribution throughout the

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1 United States.

2 In other words, the network buys
3 programming for as big an audience as it can obtain,
4 and the suppliers of that programming know they're
5 selling to a network. Advertisers buy time on network
6 stations and from the networks themselves knowing that
7 they're going to get as big an audience as they can.

8 That's the primary transmission. That's
9 the primary business of the networks. The statute
10 says fair market value of secondary transmissions. It
11 doesn't say fair market value in a vacuum. It talks
12 about fair market value of secondary transmissions.
13 That's a defined term.

14 It's a defined term that's defined guess
15 where? In the cable compulsory license Section 111.
16 That's where it's defined. And they went beyond that
17 in the statute. They identified illustrative evidence
18 that could come before you.

19 I will not bicker on opening statement
20 about what exactly that means. But I will point out
21 to you that for a statute to say look to similar
22 signals in the compulsory license marketplace means

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1 something.

2 A similar signal in the compulsory license
3 marketplace is WTBS going up to a bird, coming down to
4 a cable head end, and being paid for under Section
5 111. You can't get more similar than that.

6 But the compulsory license for cable is
7 the license on which the other guys are strangely
8 silent in their direct case. And I think they're
9 silent for a couple of reasons. One is they know that
10 we're already paying more than what cable pays under
11 111.

12 They also know that cable royalties under
13 111 have declined since the last proceeding. And they
14 also know that last year they had an opportunity with
15 the cable industry to adjust that rate and didn't.
16 Well, willing buyer, willing seller? The cable
17 compulsory license is a constant theme in 119 from its
18 birth to its current incarnation.

19 What the last CARP did with it, its
20 opinion speaks for itself. But I have to tell you if
21 Mr. Garrett thinks or you think that the last CARP
22 decision was a smashing victory for me and a

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1 development of the average cost of cable, then would
2 you please tell my clients?

3 That is not how we see it. What's
4 happening under the copyright owners' view, I believe,
5 is that they are trying to make 119 into something
6 that it is not, one that is entirely divorced from the
7 cable compulsory license. They're trying to take the
8 six and a half million subscriber business and make it
9 the tail that wags the \$62 million dollar dog.

10 Excuse me, million subscriber dog. I want
11 to leave you with a few additional thoughts when you
12 hear the evidence. The networks in particular either
13 have or profess a peculiar confusion about the TV
14 distribution business.

15 There is a real difference between
16 collecting wide audiences for one channel to show
17 advertising on which is the broadcast business.
18 There's a difference between that and assembling a
19 package of services to cable or satellite customers.

20 We're going to amplify that distinction as
21 the case goes on. But as the case goes on, I think
22 you should be asking yourselves why the DBS carriers

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1 are not paid by the networks like an affiliate or
2 given a share of advertising revenue for letting the
3 networks reach new audiences instead of vice versa.

4 I think that as the evidence goes forward,
5 you need to exhibit some particular skepticism about
6 another piece of evidence: simple analogies to the
7 cable networks and the deals they do with the cable
8 operators. There is no doubt that there are license
9 fees paid by cable operators to cable networks.

10 But from that, the copyright owners are
11 extrapolating a price which is based itself on
12 quicksand. The affiliation between a cable network
13 and cable subscriber is a -- excuse me, cable system
14 is far more complicated a transaction than the license
15 fee which show you.

16 There are many other economic components
17 that are not reflected in those numbers. Indeed, if
18 those numbers define the cable universe, we probably
19 wouldn't have a cable industry because that's not the
20 economic transaction that's going on.

21 When you look at the entirety of that
22 transaction, you're going to find arrangements that

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1 look very much like broadcast networks paying for
2 distribution through an affiliate. Not in all cases,
3 but plenty.

4 And there is another area in which you
5 should hear evidence with a degree of skepticism. You
6 heard quoted to you à la carte prices, although not
7 perhaps in those words. Retail price strategies in a
8 competitive business like this vary widely.

9 Suppose you go to a store that's having a
10 one cent sale. Buy one item for ten dollars, get the
11 next one for one cent. You might question whether the
12 first item is really being sold for ten dollars. You
13 need to look at what customers buy and things are
14 packaged in order to make sense of retailing.

15 Now, the carriers come here today with I
16 think a very reasonable proposal. We could have come
17 to you with scorched earth and said have them pay us;
18 we are an affiliate in the sky. But what we've done
19 is offer you a case that is based largely, but not
20 exclusively, on what other multi-channel video
21 providers pay in this highly competitive business.

22 Now on the one hand, you have a case that

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1 says panel, press it high. These guys can self help.
2 They don't like it, they drop us. What's the harm?

3 We think that what we're offering is the
4 fairest offer on the table, and we'll prove that to
5 you through our evidence.

6 CHAIRMAN GRIFFITH: All right, thank you.

7 Do you want to start the testimony now or
8 do you want to take a break?

9 Mr. Garrett, let me just inquire. We said
10 lunch at 1:00. Do you want to take lunch now and
11 start the testimony so it won't be interrupted?

12 MR. GARRETT: I'm always hungry, Your
13 Honor. I can take it now.

14 I think that's a fair suggestion.

15 CHAIRMAN GRIFFITH: Why don't we do this
16 then. We're still trying to consider this motion or
17 reconsideration as I characterized it, I guess. Why
18 don't we take our lunch recess right now and we will
19 begin with the testimony at 1:15. Agreeable?

20 All right, thank you.

21 (Whereupon, the proceedings recessed for
22 lunch at 12:25 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:55 p.m.)

CHAIRMAN GRIFFITH: All right. Ladies and gentlemen, I apologize for being ten minutes late. However, we have been resolving one issue.

First, before I read that, from the court reporter, "Please ask people to speak from the back of the room either: one, raise their voice; or, two, come forward to a microphone. I'm having trouble hearing their comments." I would appreciate that and heartily endorse her suggestion.

Mr. Glist, your motion, sir, that you presented this morning is denied. We will prepare this evening or for tomorrow a written copy of the order stating the basis on which the motion has been denied.

All right. Mr. Trautman are we ready?

MS. BEHAN: Your Honor, my name is Kathleen Behan. I represent the Joint Sports Claimants. And I'll be asking Mr. Trautman a series of questions so that he can highlight his direct testimony and then be presented for cross-examination.

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1 CHAIRMAN GRIFFITH: All right.

2 MR. GLIST: I don't much wish to interrupt
3 her line, but I think we are actually at a threshold
4 moment. Ms. Behan and I had a conversation prior to
5 resumption of the hearing.

6 It is her intention to go beyond voir dire
7 questioning in direct. And since we are apparently
8 working to rule based on the ruling of the motion, I
9 would direct your attention to Rule 25147.

10 The attorneys sponsoring a witness have
11 the right to ask questions with respect to competency
12 and then turn over the witness for voir dire. At that
13 point, under Sub E, the witness may summarize or read
14 but may not supplement.

15 There is a requirement in the rule that
16 the panel discouraged cumulative testimony. I know
17 you've all had the prefiled written direct for a week.
18 And J finds who is entitled to questions going beyond
19 this. And the entitlement is to cross-examination and
20 to redirect.

21 I would note that in the last CARP, the
22 manner in which this was handled was for the witness

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1 to go through voir dire, make a brief oral summary of
2 the testimony, and be turned over for cross. It
3 expedited the hearing enormously. And that complies
4 with the rules.

5 CHAIRMAN GRIFFITH: All right.

6 MS. BEHAN: Your Honor, I'd just note that
7 what the rule actually says is the witnesses shall be
8 required to be examined for competency in dual voir
9 dire. It also says then that witnesses may summarize,
10 highlight, or read their testimony.

11 Traditionally in these proceedings, like
12 in the last cable proceeding, a series of questions
13 was asked by the counsel for the party who is
14 presenting the witnesses to permit the witness to be
15 able to highlight their testimony. That's all we
16 intend to do.

17 What we don't intend to do is go beyond
18 the scope of our written direct testimony. In fact,
19 what I would like for you all to do is eventually
20 bring out the direct testimony so that you can follow.

21 That is the way it was handled in the
22 cable proceeding. It was not handled that way in

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1 1992, I understand, because there were only two days
2 for the entire hearing. But we obviously have much
3 more. And given the complexity and the length of the
4 testimony, I think it's helpful for the panel to be
5 able to have a brief question and answer format so
6 that we can then go into the direct.

7 It has been standard practice. If you
8 were to rule that that was not be appropriate, you
9 would be essentially making precedent here. And I do
10 intend to keep my questions very brief.

11 One other thing, which is if he had wanted
12 to curtail the case this way, then I think he should
13 have raised it in a motion at the time that he was
14 supposed to raise all of the motions. I think it's
15 untimely, as have been his other motions that he has
16 raised.

17 CHAIRMAN GRIFFITH: Okay. All right.
18 Once again, sir, your motion is denied, reserving to
19 you, however, the right to raise an objection if
20 indeed the questioning goes beyond the scope of the
21 written direct testimony as submitted on behalf of
22 this witness. All right?

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1 MS. BEHAN: Okay.

2 CHAIRMAN GRIFFITH: Go ahead, please.

3 MS. BEHAN: Good afternoon, Mr. Trautman.

4 As you know, my name is Kathleen Behan. I represent
5 the Joint Sports Claimants. I'll ask you some
6 questions. Thank you for coming today.

7 MR. TRAUTMAN: Thank you.

8 MS. BEHAN: Congratulations for being the
9 opening witness.

10 Whereupon,

11 JAMES MICHAEL TRAUTMAN

12 was called as a witness by counsel for the Joint
13 Sports Claimants, assumed the witness stand, was
14 examined, and testified as follows:

15 DIRECT EXAMINATION

16 BY MS. BEHAN:

17 Q Can you state your full name for the
18 record?

19 A James Michael Trautman.

20 Q Where are you employed, Mr. Trautman?

21 A Bortz and Company, Incorporated.

22 Q What is Bortz and Company?

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1 A Bortz and Company is a research and
2 consulting firm that specializes in assisting media
3 industry clients, particularly in the area of
4 evaluating new business opportunities and market
5 trends associated with new technology.

6 Q What is your title with Bortz and Company?

7 A Senior Vice President and Director.

8 Q Now, Mr. Trautman, you've included your
9 resumé.

10 MS. BEHAN: In fact, it's at the beginning
11 of Tab A, Your Honors, in the binders.

12 BY MS. BEHAN:

13 Q Mr. Trautman, can you tell me what your
14 specific job responsibilities are with Bortz and
15 Company?

16 A Yes. I direct the subscription television
17 practice of Bortz and Company. The three principal
18 areas which I oversee are the company's work in the
19 area of working with owners of cable programming
20 networks and both existing networks and new networks,
21 business planning and strategic planning for those
22 companies as well as assessment of the competitive

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1 landscape.

2 The second area is working primarily with
3 multiple cable system operators under a joint venture
4 that my company has with another company called the
5 Competitive Strategies Group, in which we work with
6 those companies to assist them in evaluating the
7 market prospects of alternative distribution
8 technologies and in, again, strategic and business
9 planning.

10 CHAIRMAN GRIFFITH: Ms. Behan, let me
11 interrupt you just a moment. It has occurred to me,
12 even though he has written direct testimony, to verify
13 it, does he need to be placed under oath?

14 MS. BEHAN: I should have had that done.

15 CHAIRMAN GRIFFITH: Okay. I'm going to do
16 it right now. If you'll raise your right hand,
17 please, sir?

18 Whereupon,

19 JAMES MICHAEL TRAUTMAN

20 was duly sworn, further examined, and testified
21 further as follows:

22 BY MS. BEHAN:

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1 Q You were saying?

2 A And the third area that we specialize in
3 is assisting media companies in evaluating business
4 opportunities associated with new technology.

5 Q And who are some of the clients that you
6 have worked on behalf of?

7 A Many major media companies, CBS, Disney
8 ABC, a number of the major cable operators: TCI,
9 Telecommunications, Inc.; Time-Warner; Cox
10 Communications; --

11 THE WITNESS: -- Comcast; Continental; a
12 variety of other companies.

13 MR. GLIST: Objection. Neither Comcast
14 nor Continental are in direct.

15 CHAIRMAN GRIFFITH: Do you concede that or
16 not?

17 MS. BEHAN: Do I concede that neither
18 Comcast nor Continental are in direct? I don't see
19 those two listed on his resumé. So if you'd like to
20 strike those two from the record.

21 CHAIRMAN GRIFFITH: It's stricken.

22 BY MS. BEHAN:

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1 Q If you want to look at your resumé to help
2 you remember which companies are listed in it?

3 A Yes, certainly.

4 Q Then we'll stick to that.

5 Can you tell me what type of work you've
6 done on behalf of Capital Cities/ABC?

7 A Yes. My company has had a -- or had a
8 retainer relationship from 1979 through 1996 with
9 Capital Cities/ABC, through which we evaluated a
10 number of new business opportunities for the company.
11 Among those were opportunities in cable programming,
12 opportunities in the home video market, and
13 opportunities in direct broadcast satellite.

14 Q Now, what about for TCI?

15 A For TCI, the projects that I had performed
16 have typically been under the Competitive Strategies
17 Group joint venture, and those have typically involved
18 strategic planning and business planning in individual
19 markets in preparation for competition.

20 Q Okay. You also indicate in your resumé
21 that for a major international cable operator, that
22 you developed recommendations relating to direct

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1 broadcast satellite. What did that involve?

2 A Well, that specifically involved exploring
3 the opportunities and the nature of the direct
4 broadcast satellite companies and their economics to
5 assist this company in evaluating potential
6 partnership opportunities to provide the direct
7 broadcast satellite services to apartment complexes.

8 Q And then if you could go to Page 2 of your
9 resumé --

10 MR. GLIST: Objection. Apartment
11 complexes are not in direct.

12 MS. BEHAN: If you look at the first page
13 of his resumé, it explains the --

14 BY MS. BEHAN:

15 Q What you just explained, was that the last
16 bullet?

17 A Yes. Those were the types of business
18 arrangements that --

19 MS. BEHAN: Your Honor, I'd just say for
20 the record the rule is that the witness may not
21 materially supplement his testimony. I'm not sure
22 that adding the word "apartment" complexes materially

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1 supplements his testimony.

2 I would appreciate some sort of ruling on
3 what constitutes a material supplement to the
4 testimony.

5 CHAIRMAN GRIFFITH: The objection is
6 overruled. The issue here is the competency of the
7 witness at this particular juncture. And that's
8 pretty tight.

9 MS. BEHAN: And I would also say that's
10 not necessarily the subject of the material
11 supplementation.

12 CHAIRMAN GRIFFITH: It is not.

13 MS. BEHAN: All right.

14 BY MS. BEHAN:

15 Q Let me just ask you to go to Page 2 of
16 your resumé.

17 A Sure.

18 Q In your resumé, it says that in
19 conjunction with Arthur Andersen, you developed a
20 cable operating performance benchmark study. Can you
21 tell me a little bit about that study and what you
22 looked at in that study?

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1 A Yes. What that study did was aggregate
2 information, detailed financial information, from more
3 than 150 different cable systems around the country
4 for the purposes of developing benchmarks or norms for
5 operating performance that firms in the industry could
6 use for comparative purposes.

7 Q Now, you also say in your resumé that you
8 eventually looked for the issue of estimated fair
9 market value for numerous television station
10 properties. Can you tell me a little bit about that
11 work that you have done?

12 A Yes. Our company over the last several
13 years has evaluated or assessed the market value for
14 various clients of a number of different television
15 stations as well as cable television systems in
16 different markets around the country.

17 Q Is it fair to say, then, that you have
18 done financial and market analyses for clients,
19 including some of which are on both sides of the aisle
20 here today?

21 A I think that's fair to say, yes.

22 Q In particular, TCI's financial interest in

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1 some of the satellite carriers?

2 A That's correct.

3 Q And you have also done financial analyses
4 for some of the networks?

5 A Yes.

6 Q And you have also done financial analyses
7 for some of the other program suppliers, such as PBS?

8 A That's correct.

9 Q For how many years have you been involved
10 in the analysis of structuring characteristics of the
11 subscription television industry?

12 A Well, since 1983. So almost 14 years.

13 Q And during that time, for how long have
14 you actually worked with Bortz and Company?

15 A Bortz and Company was formed in 1988.
16 Prior to that, I was with a predecessor firm: Brown,
17 Bortz and Coddington. And Bortz and Company, in
18 essence, represents -- the five current partners of
19 Bortz and Company were all employees of Brown, Bortz
20 and Coddington prior to forming Bortz and Company.

21 Q Now, Mr. Trautman, throughout the course
22 of your testimony, I'm going to be using a number of

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1 terms of art in the industry. And as I use those
2 terms of art, what I would like you to do and
3 consistent with your written testimony is to explain
4 the terms as necessary as we go.

5 A Sure.

6 Q Is it fair to use the term "subscription
7 television distribution" to refer to the delivery of
8 video programming to homes by cable and satellite?

9 A Yes, it is.

10 Q Okay. Can you tell me why you were
11 retained by the Joint Sports Claimants?

12 A I was retained to provide an overview of
13 subscription television distribution technologies and
14 specifically of the development of the cable and home
15 satellite industries as well as to discuss the nature
16 of the relationships that these distribution companies
17 have with the programming services that they offer.

18 Q So in discussing the topics for which you
19 have been asked to testify, is it fair to say the four
20 topics are: one, the technologies for transmitting
21 video programming?

22 A Yes.

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1 Q And then, second, the history of
2 development of cable and satellite industries?

3 A That would be correct.

4 Q And then, third, the characteristics of
5 cable and DBS satellite programming distribution
6 relationships?

7 A Yes.

8 Q And then, finally, the typical types of
9 programming packages and lineups that are on the
10 various services that provide subscription television
11 programming?

12 A That's right.

13 MS. BEHAN: Your Honor, I'd now like to
14 offer Mr. Trautman up for voir dire.

15 CHAIRMAN GRIFFITH: All right. Any
16 questions?

17 MR. GLIST: No questions on competency.

18 CHAIRMAN GRIFFITH: All right. Thank you.

19 MS. BEHAN: Okay.

20 BY MS. BEHAN:

21 Q Mr. Trautman, first go to Topic 1. Topic
22 1 is the basic technologies. I'm referring here -- it

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1 might help you to just have the testimony out in front
2 of you -- to Pages 1 and 2 of your testimony.

3 A I'm there.

4 Q Okay. Mr. Trautman, why do we call these
5 technologies subscription television distribution
6 technologies?

7 A Well, they're distribution technologies
8 because they are the technologies that are used to
9 bring the programming services from a distributor to
10 the consumer.

11 Q We're going to talk first about cable
12 television, which most of us are familiar with. Can
13 you first list for me before we talk about cable the
14 basic types of distribution services that we're going
15 to talk about today?

16 A Sure. Well, in essence, we'll be talking
17 about four technologies and five categories of
18 distributor with the fifth category for the most part
19 using one of the other four technologies, telephone
20 and utility companies.

21 Q Now, is it possible to transmit multiple
22 channels of video programming using all of these

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1 technologies?

2 A Yes, it is.

3 Q Now, what do we call customers who receive
4 multiple video channel programming for these
5 technologies?

6 A Well, they're typically referred to as
7 subscribers.

8 Q That's because, going back to the opening,
9 they subscriber, rather than get it through rabbit
10 ears or some other over-the-air --

11 A That's correct. They pay a subscription
12 fee.

13 Q Now, if you can begin with cable and just
14 briefly highlight for the panel the technologies that
15 are the basis of cable television?

16 A Well, cable television systems construct
17 a central distribution facility, which is commonly
18 referred to as a head end. And they also string cable
19 from that distribution facility throughout the market
20 that they serve to the individual homes or residences
21 in that market.

22 The central distribution facility, or head

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1 end, obtains the programming that it distributes over
2 the cable to the home through various means but most
3 commonly from satellite.

4 Q What is at the head end?

5 A Well, the head end encompasses satellite
6 receiving dishes that bring the programming in from
7 satellites. It also may receive programming from
8 other sources. And then its function is to prepare
9 the programming for transmission via cable.

10 Q Now, if you go to the second, the direct
11 to home satellite, what is that? And why do we use
12 the term "DTH" to describe it?

13 A Well, use of the term "direct to home"
14 refers to the fact that the programming is transmitted
15 directly from a satellite to a satellite receiving
16 dish at the consumer's home.

17 Q A home satellite dish?

18 A Well, home satellite dish is a commonly
19 used term to describe C-band, the portion of the
20 direct to home satellite business that utilizes C-band
21 to receive the programming.

22 C-band dishes or the C-band segment of the

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1 business is that segment from which programming is
2 transmitted from satellites that use a C-band
3 frequency to dishes at individual customers' homes.
4 And that programming is already on those satellites
5 for other purposes, typically for distribution to
6 cable systems or to other commercial users.

7 So, in other words, the programming is
8 already up there. And the companies that engage in
9 the packaging of that programming make use of the
10 existing satellites that are out there.

11 Q Can you contrast that with direct
12 broadcast satellites, or DBS?

13 A Yes. In the case of DBS, companies have
14 put their own satellites up in orbit and obtain
15 programming often from the C-band satellites and bring
16 it to a ground station that they have constructed and
17 then, as I think was described before, uplink that
18 programming or send a point-to-point transmission to
19 the satellite that they have put in orbit. And then
20 that programming is downlinked or transmitted from
21 there to the individual customer's home.

22 Q And in this proceeding, we are looking at

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1 both HSD and DBS. Is that fair to say?

2 A Yes.

3 Q Now, what about satellite master antenna
4 television? What is the technology that is used
5 there?

6 A Well, satellite master antenna television
7 is frequently referred to as private cable. And that
8 is because, in essence, it's a cable system that has
9 been built at an individual apartment complex, usually
10 a large apartment complex, or some other multifamily
11 dwelling unit complex.

12 Again, a small head end is constructed at
13 the facility. And then cable is connected to the
14 individual units in the complex.

15 Q When you say "Again," like the head end
16 that's used in cable television?

17 A Yes.

18 Q But not in direct to home satellite?

19 A That's correct.

20 Q Now, MMDS, multichannel multi-point
21 distribution service, what does that refer to?

22 A MMDS is a technology where the service

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1 provider instructs the head end. And usually adjacent
2 to the head end, a tower and transmitter that
3 transmits using microwave frequencies programming to
4 antennas that are placed typically on a customer's
5 roof.

6 Q Telephone and utility companies?

7 A Well, as I mentioned before, telephone and
8 utility companies, well, particularly telephone
9 companies, have explored means to transmit video
10 programming over their existing facilities, but in
11 general have found that use of either cable television
12 or MMDS or direct to home satellite technologies are
13 the means that they have now moved toward in terms of
14 looking at options for providing video services.

15 Q Now, Mr. Trautman, are you familiar with
16 the FCC's annual assessment of the status of
17 competition in the market for delivery of video
18 programming?

19 A Yes, I am.

20 Q In particular, are you familiar with the
21 1995 FCC annual assessment report?

22 A Yes.

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1 Q And have you sponsored that report as an
2 exhibit to this proceeding?

3 A Yes, I have.

4 Q There is a copy of that report included in
5 the testimony.

6 CHAIRMAN GRIFFITH: Table 1?

7 MS. BEHAN: At Table 1, yes, Exhibit 1.

8 BY MS. BEHAN:

9 Q Now, does that report describe in more
10 detail some of the technologies that we have
11 discussed?

12 A Yes, it does.

13 Q And does it, as its title suggest, provide
14 an assessment of status of competition in the market
15 for the delivery of video programming?

16 A Yes, it does.

17 Q And the report that you submitted with
18 your testimony was dated December 11th, 1995. Is that
19 correct?

20 A Yes.

21 MS. BEHAN: Your Honors, I'd just like to
22 note for the record that there is a more recent report

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1 that was released in the end of 1996. It's my belief
2 that the SBCA will object to the inclusion of that
3 report.

4 So while we have raised the issue with
5 them previously about supplementing our cases because
6 of the length of the time that has elapsed and to
7 allow the new information available, like this report,
8 that might be relevant, we understand that they will
9 object.

10 And so if the panel decides, according to
11 the rules, that it wants to expand Mr. Trautman's
12 testimony to include that report, we have it
13 available. You're permitted to do so under the rules,
14 but I do understand that there would be an objection
15 to that.

16 So I just wanted to let you know it's out
17 there. It is available.

18 CHAIRMAN GRIFFITH: It is available.

19 MS. BEHAN: Yes.

20 JUDGE COOLEY: Are you making a motion now
21 to supplement the direct case or are you planning to
22 put that off until your case is called or what are you

1 planning to do?

2 MS. BEHAN: I am not making a motion right
3 now to supplement, but I did want to say it's a
4 publicly available report that is available at any
5 time.

6 CHAIRMAN GRIFFITH: You're inquiring that
7 if we want --

8 MS. BEHAN: Yes.

9 CHAIRMAN GRIFFITH: -- and feel the need
10 for it, that it is there, it's available.

11 JUDGE COOLEY: Let me understand this.
12 This would be the December 1996 FCC report. Is that
13 right?

14 MS. BEHAN: Yes. It gives you the most
15 recent information about what the FCC believes to be
16 the status of competition in the market, and it's
17 compiled as a result of possible submissions by
18 parties to this proceeding as well as by their own use
19 of relevant secondary sources, some of which will also
20 be used in this proceeding.

21 JUDGE COOLEY: I'm just kind of curious to
22 know what the objection to that document would be.

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1 MR. GLIST: Your Honor, I think it's a
2 citable FCC document that this panel could take
3 official notice of. And indeed you could take
4 official notice of JSC Exhibit Number 1 without even
5 moving it into evidence.

6 Our only concern is just how far beyond
7 direct this actually goes.

8 MS. BEHAN: Excuse me. For the panel's
9 consideration, I have it here. And I could give it to
10 people. I'm willing to pay for the prices. You'll
11 have to go get it yourself if you'd like it. But
12 we're not planning to ask him any questions about it.

13 CHAIRMAN GRIFFITH: We want it.

14 MS. BEHAN: You do want it?

15 CHAIRMAN GRIFFITH: Yes.

16 MS. BEHAN: I will then make a proper
17 motion to have this moved into evidence as Exhibit 1B
18 to Mr. Trautman's testimony so that it could be
19 included to the extent that you want to use it in the
20 record. But I will not refer to it during the
21 proceeding.

22 CHAIRMAN GRIFFITH: All right. It has

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1 been moved that it be received as Exhibit 1B to Mr.
2 Trautman's testimony, direct testimony. And it's my
3 understanding that you do not intend to refer to it
4 further, however, either in questioning the witness or
5 --

6 MS. BEHAN: Well, it may come up in the
7 course. Once it's moved into evidence, it may come up
8 in the course of redirect or cross.

9 CHAIRMAN GRIFFITH: I understand.

10 MS. BEHAN: But not in the --

11 CHAIRMAN GRIFFITH: In your direct
12 examination, you do not intend to refer to it?

13 MS. BEHAN: Yes.

14 CHAIRMAN GRIFFITH: All right. Thank you.
15 It's part of the record.

16 (Whereupon, the aforementioned
17 document was marked for
18 identification as Exhibit
19 Number 1B and was received in
20 evidence.)

21 BY MS. BEHAN:

22 Q Mr. Trautman, I'd now like to go into Page

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1 3 of your testimony, a discussion of cable and direct
2 home satellite growth and trends in market size,
3 basically the development of the markets that we're
4 talking about today.

5 A All right.

6 Q Could you begin by briefly describing for
7 me in accordance with your testimony the history of
8 the development of cable television?

9 Q Yes. Well, cable television began in the
10 early 1950s. And its primary function was as a
11 reception service designed to allow customers in
12 smaller markets to gain access to the broadcast
13 television station signals that were popping up in
14 some of the larger markets around the country. And
15 many of those people in smaller communities were too
16 distant from the broadcast transmitter to be able to
17 receive those signals otherwise.

18 Q At some point did cable expand beyond the
19 smaller market industry that it was in the '50s?

20 A Yes, it did. It remained primarily a
21 small market industry until the early -- into the
22 1970s and really began to move beyond smaller markets

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1 in 1975 with -- when Home Box Office, or HBO, was
2 placed on satellite and, therefore, through the use of
3 satellite became efficiently available to cable
4 systems all across the country. And they began to be
5 able to offer that service.

6 Q Okay. Was this followed by the
7 development of independent stations by cable?

8 A Well, actually, this was followed by
9 certain independent stations beginning with WTBS from
10 Atlanta in 1976 being also placed on the satellite and
11 also shortly thereafter by cable programming networks
12 with programming specifically developed for service to
13 cable companies also being placed on satellite.

14 Q When you say "programming networks," what
15 are you referring to there?

16 A Well, programming services, in essence, a
17 channel of programming. And some of the examples of
18 those that began to develop in the late 1970s were:
19 Cable News Network, CNN; ESPN; and a few others.

20 Q Is it fair to call those cable networks
21 for the purpose of your testimony going forward?

22 A Yes.

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1 Q Okay. And are those different than what
2 you say on the page before, which is independent
3 stations, broadcast stations?

4 A Yes, they are different from those
5 stations.

6 Q Now, what has happened since the '70s with
7 cable televisions?

8 A Well, since the 1970s, cable television
9 has experienced rapid growth growing from a customer
10 base of about 15 million homes in 1980 to more than 60
11 million today.

12 Q And if you could go to Page 4 of your
13 testimony now, --

14 A Sure.

15 Q -- Table 1? Can you just briefly
16 highlight for the panel what is described in Table 1?

17 A Yes. Table 1 shows the number of
18 subscribers served by -- in the first column by the
19 ten largest multiple system operators of cable
20 systems, that the term "multiple system operator"
21 refers to companies that operate more than one cable
22 system. In fact, most of them operate many.

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1 And the first column shows the number of
2 subscribers that they own or have financial interests
3 in as of the middle of last year. The second column
4 shows the total revenue of those companies. And the
5 third column shows the estimated revenues that those
6 companies generate from their cable system operations.

7 Q So can you give us an example perhaps
8 using TCI?

9 A Sure. TCI as of the middle of last year
10 owned systems which serve just short of 15 million
11 subscribers. The company in total during 1995
12 generated about \$6.9 billion in revenue. And cable
13 system operations accounted for a little over 5
14 billion of the revenues that they generated.

15 Q Now, the information that's contained in
16 this table, where did it come from?

17 A This information came from a company
18 called Paul Kagan Associates, which is a firm that
19 tracks and provides data on the cable television
20 industry and various other media industries as well.

21 Q This cable TV financial data book, is that
22 a source that's regularly relied upon by the media

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1 industries?

2 A Yes, it is.

3 Q And it's a source that you regularly rely
4 upon?

5 A Yes, it is.

6 Q Now, if you'd just look at this table?
7 I'll ask you one more question. If you look at the
8 top five of these companies that are listed, is it
9 fair to say that they all generate in excess of a
10 billion in annual revenues?

11 A Yes, it is fair to say that.

12 Q Okay. And do some of these companies have
13 interests in media and entertainment enterprises
14 besides cable?

15 A Yes, they do. And that reflects the
16 difference in their total revenues versus the cable
17 system revenue column.

18 Q Would that include satellites?

19 A Yes, it would.

20 Q Now would you like to discuss, I think,
21 virtually the development of the satellite, direct to
22 home satellite, business, particularly as it grows out

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1 of cable?

2 A Sure. Well, in essence, following the
3 placement of Home Box Office on satellites and the
4 beginnings of other programming services and broadcast
5 stations going on to satellites, the notion of a
6 direct to home satellite, which had actually been
7 discussed prior to that, but it became something that
8 was realistically feasible to do.

9 And by beginning really in the early
10 1980s, home satellite dishes that were reasonable for
11 consumers to afford -- and these were the larger
12 C-band satellite dishes -- began to emerge.

13 And customers in fairly large numbers
14 began to buy these dishes because they were able to --
15 by paying the up front amount and purchasing the
16 receiving equipment could then receive the programming
17 that was on these satellites with no programming cost
18 to the consumer.

19 Q At some point did program services begin
20 to scramble their signals to prevent the use of those
21 signals without compensation in the free market?

22 A Yes. The number of C-band dishes grew

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1 rapidly through 1985. And then in 1986, again started
2 by Home Box Office, the program services on the
3 satellites began to encrypt or scramble their signals
4 so that a customer had to be authorized or have a
5 decoding unit in their home to authorize the reception
6 of that programming.

7 Q Now, HBO would be considered a cable
8 network. Is that correct?

9 A Yes, it would.

10 Q But would that be called a premium cable
11 network today or --

12 A It would be called a premium cable
13 network, which we could discuss later.

14 Q Tell us a little bit about the development
15 of DBS.

16 A Well, DBS services were initially
17 developed or the idea of using the direct broadcast
18 satellite, the Ku-band portion of the spectrum for
19 this service, began in the early 1980s.

20 And then there were efforts to launch
21 services, direct broadcast satellite services, up to
22 in the 1984-1985 time frame, but those services did

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1 not prove successful in the marketplace.

2 And DBS really kind of remained not
3 existent as a consumer product until the early 1990s,
4 when in 1991 the Prime Star service was launched.

5 Q Did that accelerate in 1994 with the
6 launch of other DBS services?

7 A Yes, it did. In June of 1994, direct TV
8 and USSB launched. And Prime Star also in 1994
9 expanded the number of programming channels that it
10 offered to customers. And the industry began to grow
11 rapidly at that point.

12 Q Now, as of September '96, where were
13 customer accounts for DBS, as opposed to HSD?

14 A I'm sorry. As of what date?

15 Q I'm sorry. Let me state that: How many
16 customers for DBS were there by September 1996 in your
17 testimony, when you were asked to summarize your
18 testimony?

19 A The number of DBS customers was
20 approximately 3.5 million as of September 1996.

21 Q Has that increased today?

22 A Yes, it has.

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1 Q Can you go to Table 2, which is on Page 7,
2 and just summarize for the panel what information is
3 provided to them in that table?

4 A This just, this table just, provides a
5 brief profile of the different direct broadcast
6 satellite companies describing their ownership, when
7 they launched, the number of subscribers they had as
8 of the time this report was prepared, the number of
9 channels that they can offer and the size of the
10 satellite dish that is used to receive the service.

11 Q So, again, if you could just pick out one
12 and explain for us each of the various items as listed
13 in the table?

14 A Well, in the case of direct TV, for
15 example, we see that it is owned by Hughes
16 Communications, which is a -- the parentheses indicate
17 it is a subsidiary of General Motors and also a
18 minority ownership interest held by AT&T.

19 The service was launched in June 1994 and
20 had approximately 1.9 million subscribers as of
21 September 1996. The service offers on the order of
22 175 to 200 channels of programming. And that

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1 programming can be received with a dish that is 18
2 inches and 24 inches in diameter.

3 Q Now, Mr. Trautman, since you submitted
4 your direct written case, has any of the information
5 in this table changed?

6 A Yes, it has.

7 MS. BEHAN: At this point I would just
8 like to submit for the panel that there may be
9 information that has changed, such as ownership
10 information, for one or more of the satellite service
11 providers.

12 Again, for completeness and accuracy, if
13 you like, before you're submitted for
14 cross-examination on these materials, we can give him
15 an opportunity to add to it. But, again, I think it's
16 subject to whether you're going to object on that
17 basis.

18 MR. GLIST: I think it's material that
19 goes beyond direct from your own explanations.

20 MS. BEHAN: What I would be doing is
21 trying to correct the record. And I would be doing
22 that, in part, to protect against cross-examination

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1 based upon what has happened since the direct case was
2 submitted.

3 CHAIRMAN GRIFFITH: And do I understand
4 you're referring only to ownership changes?

5 MS. BEHAN: Well, I'd like him to correct
6 the table if it's now inaccurate in accordance with
7 what the rules permit because of changes in the
8 industry.

9 MR. GLIST: If it please the panel, if all
10 that Ms. Behan wants to do is to update the current
11 ownership, which is otherwise publicly available, then
12 we don't have a problem with that. If it gets out of
13 hand, then I'll raise an objection.

14 CHAIRMAN GRIFFITH: Yes. The rules
15 specifically provide for -- they can't supplement.
16 However, they can correct.

17 MS. BEHAN: Your Honor, I --

18 CHAIRMAN GRIFFITH: But we're going to
19 permit him to amend or correct it.

20 MS. BEHAN: What I would suggest that
21 there has been a length of time that has passed since
22 we submitted our direct cases. And a lot has

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1 happened. New statements of accounts have been
2 submitted. There's been new information. Ownership
3 interests may have changed.

4 I think it's best for the panel to have
5 the accurate information, but what you might want to
6 do is ask the witnesses to correct, if necessary, and
7 then resubmit our cases at the end to the extent the
8 panel believes that it wants accurate information.
9 We'd be willing to do that with one possible
10 procedure.

11 The other possible procedure is to mark it
12 off in your cases.

13 CHAIRMAN GRIFFITH: Do you have any
14 objection to the witness going ahead and testifying as
15 we've indicated to correct information contained on
16 this table and then permitting her to submit to us an
17 amended copy which reflects the witness' testimony?

18 MR. GLIST: I think that generally it's
19 acceptable for them to correct errors if there are
20 errors. And, as I said, I don't have a problem in
21 updating ownership information because you ought to
22 know who owns who, but I'm not sure what else is being

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1 corrected.

2 So it's hard for me to waive any possible
3 objection. If I have a whole new table on cross to
4 depend upon in the next hour, then I have a problem.

5 CHAIRMAN GRIFFITH: It's actually, though,
6 that it's not really -- it was accurate when you
7 presented it. The information has changed, however,
8 since the time that it was filed with the direct case.
9 So it's not really in error.

10 MS. BEHAN: It's really for purposes of
11 the panel having complete information. The panel can
12 direct some sort of procedure for us to do that,
13 rather than it's not --

14 CHAIRMAN GRIFFITH: All right. Why don't
15 you go ahead and inquire of the witness as to what the
16 changes are? And then we'll make a determination as
17 to whether or not it's necessary to supplement with a
18 new chart.

19 MS. BEHAN: I think that that would be
20 good.

21 CHAIRMAN GRIFFITH: Okay.

22 BY MS. BEHAN:

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1 Q Are there any changes in here that you
2 think would require supplementation for completeness
3 and accuracy?

4 A Well, the number of subscribers for each
5 of the operating companies has grown since the time of
6 this report. And also the American Sky Broadcasting,
7 Sky-MCI proposed venture here in the far right on the
8 table has proposed to acquire a 50 percent interest in
9 or to partner with in a 50/50 relationship with Echo
10 Star, which is an operating service also on the table.

11 MS. BEHAN: Your Honors, just for the
12 purpose of making it clear, right now the two issues
13 that I can imagine coming up in the course of our
14 direct case we would prefer to supplement for accuracy
15 and completeness are any ownership interests that
16 might have changed and the number of subscribers per
17 carrier or per signal that might have changed since
18 then so that you have the most accurate and up-to-date
19 basically.

20 I would submit that for your consideration
21 as the two that I can now think of. There's possibly
22 more, but I can't think of any right now.

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1 CHAIRMAN GRIFFITH: Okay.

2 JUDGE GULIN: I just wanted to inquire
3 whether this data -- with respect to ownership, I
4 don't think there's a problem. I'm a little concerned
5 about updating subscribership.

6 Perhaps the witness can tell us why the
7 data was not included on the original table when it
8 became available.

9 THE WITNESS: Well, the data that's
10 subsequent to this data did not become available until
11 after this report was submitted.

12 JUDGE GULIN: And this table reflects
13 figures through when?

14 THE WITNESS: September of 1996.

15 JUDGE GULIN: The new data became
16 available when?

17 THE WITNESS: Well, the most recent data
18 that would be available now -- well, the data which I
19 have figures for today is as of the end of the year
20 1996. I think there may be figures available for as
21 of January '97, but --

22 BY MS. BEHAN:

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1 Q At this point I think we would only
2 introduce one figure, which would give you a benchmark
3 as to the total figure. Is that correct, Mr.
4 Trautman?

5 A That's correct.

6 MS. BEHAN: We would not be changing each
7 of these numbers per se today.

8 CHAIRMAN GRIFFITH: The total number of
9 subscribers?

10 MS. BEHAN: The number of subscribers in
11 this chart. We'd merely be giving you a benchmark to
12 see that the overall number has changed.

13 CHAIRMAN GRIFFITH: The direct cases were
14 filed in December; is that correct, last year? And
15 this was the information which --

16 MS. BEHAN: Yes, December '96.

17 CHAIRMAN GRIFFITH: Okay. This
18 information was available as of September of 1996 and
19 was filed with the direct case. The information that
20 you're seeking to add now is information which came
21 about in either -- figures you have today the last
22 part of December 1996?

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1 THE WITNESS: Yes, as of the end of the
2 year.

3 CHAIRMAN GRIFFITH: There may have been
4 some information available at the end of January of
5 1997?

6 MS. BEHAN: To summarize, there's really
7 several pieces of publicly available information that
8 I believe are relevant to the panel's determination
9 here that have become available since we submitted
10 direct cases.

11 First are the statements of accounts that
12 have been provided by the satellite carriers and that
13 we didn't have any access to until after our cases.
14 So you've got the most recent statement so accounts of
15 what royalties were paid and how many subscribers per
16 signal, we have that available. But the second -- and
17 that's just generally for the case, not necessarily
18 for Mr. Trautman's testimony.

19 The second would be ownership interests
20 that we had no idea were going to change.

21 CHAIRMAN GRIFFITH: The panel sustains the
22 objection to changing the number of subscribers in

1 that we feel that to do would be supplementing. There
2 has to be a time where there's a cutoff or this matter
3 goes on through May, we could be getting information
4 from you on that.

5 So no, you are not permitted to change the
6 number of subscribers or update them as such
7 supplementally.

8 MS. BEHAN: When you refer to subscribers,
9 is that for direct TV? Does that include also
10 subscribers for the actual signals that are being
11 transmitted here, such as TBS, that are publicly
12 available statements of accounts filed in this
13 proceeding? Are you excluding the most recent
14 statements of accounts from this proceeding or would
15 that be a different issue?

16 It's not really raised by his testimony,
17 but I just want to make sure that the ruling doesn't
18 prohibit you from relying on the information that's
19 before the Copyright Office right now.

20 MR. GLIST: That doesn't arise with this
21 witness, does it?

22 MS. BEHAN: I'm just clarifying the ruling

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1 that it just goes to this table.

2 CHAIRMAN GRIFFITH: Right. At this point
3 we're ruling only on this table.

4 MS. BEHAN: Okay. Thank you.

5 BY MS. BEHAN:

6 Q Now, Mr. Trautman, if you could go to Page
7 8?

8 A Yes.

9 Q We're looking here at the summary of --
10 can you explain to me what's in this table?

11 A Yes. This table, again, for the same set
12 of companies provides an overview of the types of
13 programming that they offer and the packages and
14 pricing of those packages that each of the companies
15 offered, again, as of the time this report was
16 prepared.

17 Q So some of this information may have
18 changed since then?

19 A Possibly, yes.

20 Q We'll go back to the types of programming
21 later, but if we could go now to Page 9, Table 4?

22 A All right.

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1 Q Can you describe for me what is portrayed
2 in Table 4 of your testimony?

3 A Table 4 depicts the growth pattern in the
4 direct to home satellite market from June of 1994 in
5 six-month increments through June of 1996.

6 Q And where did you obtain the information
7 that is contained in this table?

8 A From a publication known as Sky report,
9 which is an industry newsletter that describes trends
10 and tracks information regarding both the C-band and
11 direct broadcast satellite segments of the satellite
12 business.

13 Q Why did you pick 1994 as your starting
14 point?

15 A Well, that was chosen because that really
16 was the beginning of the consumer market for the
17 direct broadcast satellite services. So the home
18 satellite dish segment was already in existence at
19 that time.

20 But June 1994, when direct TV and USSB
21 launched, was really the beginning point in time for
22 the direct broadcast satellite companies.

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1 Q Now, you say in the table, as you can see,
2 June 1996 you've got total direct to home subscribers
3 5.3 million?

4 A That's correct.

5 Q And you say by the end of 1996, subscriber
6 totals are projected to approach five million;
7 correct?

8 A That was an expectation at the time this
9 report was prepared, yes.

10 Q All right. If you can explain for me what
11 is expected in the industry to happen by the year 2000
12 to this trend?

13 A Well, the Sky Trend's publication, again,
14 in their 1996 annual report prepared or obtained a
15 series of industry analyst estimates of how many
16 direct to home subscribers there would be in the year
17 2000. And the consensus figure coming out of those
18 estimates was 15 million homes.

19 Q Now, when you said you drew this from Sky
20 Trend's annual report, do you know who has input into
21 Sky Trend's annual report, what companies?

22 A Well, it's published by Media Business

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1 Corporation, but I believe that that is in cooperation
2 with the SBCA, the Satellite Broadcasting and
3 Communications Association.

4 Q So it would be fair to say that this is
5 their own projection of customer levels for the year
6 2000 for DBS?

7 A Well, it's customers' levels as projected
8 by a group of analysts, which they polled.

9 Q And you said that the figures appear to
10 include HSD customers?

11 A Yes. It appears that they do.

12 Q Now I'd like to turn our attention to
13 describing some of the characteristics of DBS, in
14 particular. Okay? Again, DBS is one segment of the
15 DTH market; correct?

16 A That's correct.

17 Q And if you could just briefly describe for
18 me from a product perspective some of the
19 characteristics of DBS, direct broadcast satellites?

20 A Sure. From a product perspective, I think
21 some of the important characteristics of DBS are that
22 it provides a digital video and audio -- or digital

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1 video and audio feeds, which, subjectively anyway,
2 deliver a higher quality signal than other -- than
3 analog forms of distribution.

4 And also the DBS providers typically offer
5 a large number of channels. For example, the direct
6 TV has a channel capacity of on the order of 175
7 channels, which is a substantially larger channel
8 capacity than most, for example, cable system
9 operators currently offer.

10 Q How about from a pricing perspective?

11 A Well, from a pricing perspective, the
12 direct broadcast satellite services are somewhat
13 different from most other subscription television
14 distributors in that they sell the equipment, in most
15 instances sell the equipment, directly to the
16 consumer, rather than renting it to them or leasing it
17 to them.

18 And initially, at the launch of the direct
19 TV service, the equipment was fairly expensive, in the
20 range of 700 to 900 dollars, but during 1995,
21 particularly in 1996, prices for the equipment
22 declined rapidly and reaching essentially an industry

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1 standard level of \$199.

2 Q Then, finally, can you describe DBS from
3 an ownership and marketing perspective today?

4 A Yes. Well, the DBS companies are for the
5 most part owned by large companies. Direct TV, as I
6 mentioned previously, is owned by Hughes, which is a
7 General Motors subsidiary and has both ownership by
8 AT&T and also a marketing relationship with AT&T.
9 AT&T has an option to increase its ownership in the
10 venture to as much as 30 percent.

11 Prime Star is a venture involving the
12 largest cable multiple system operators as well as
13 General Electric or a General Electric subsidiary.
14 And the American Sky Broadcasting, or ASkyB, venture
15 involves both MCI and News Corporation, owned by -- or
16 Rupert Murdoch is familiarly identified with News
17 Corporation, which has ownership interests in the Fox
18 television network, Twentieth Century Fox Corporation,
19 and a variety of other media assets.

20 Q Now, you had said earlier there were some
21 changes. I believe Echo Star?

22 A That's correct. Well, ASkyB or the News

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1 Corp.-MCI venture has proposed to become a 50 percent
2 partner with Echo Star in jointly offering service.

3 MS. BEHAN: That is a change for the
4 record, but I believe it fits with the ruling saying
5 that we could change ownership.

6 CHAIRMAN GRIFFITH: All right. I want to
7 ask what the witness means when he says "has proposed
8 to become."

9 THE WITNESS: Well, the transaction was
10 recently announced publicly by the companies, but it
11 has not closed.

12 CHAIRMAN GRIFFITH: Okay.

13 BY MS. BEHAN:

14 Q Finally, if we can go I guess to discuss
15 programming sources, distribution relationships, and
16 packages. I'd like to talk to you a little bit about
17 the relationships between the programmers who make the
18 programming and the distributors who distribute the
19 programs.

20 A Sure.

21 Q Okay? Can you first, though, begin by
22 discussing for me some of the types of programming

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1 that are available? By that, I mean, programming
2 distribution relationship, rather than the category of
3 programming. So we can start up with local broadcast
4 stations.

5 A Yes. Well --

6 Q Can you just explain for me: What is a
7 local broadcast station?

8 A Well, a local broadcast station is a
9 station -- is a facility that is licensed to a
10 particular market by the FCC to provide television
11 service to that market.

12 Q And local broadcast stations, are they
13 available for DBS and HSDs?

14 A They are currently not available via DBS
15 and HSD in the local markets that they are licensed
16 to.

17 Q Are they available distantly in some
18 instances?

19 A Yes, they are. Certain of these stations
20 are carried by direct broadcast satellite and home
21 satellite dish companies for distribution to other
22 locations.

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1 Q Now, do local broadcast stations -- first
2 of all, can you give me some examples of some local
3 broadcast stations?

4 A Local broadcast stations, there are some
5 examples in Table A1 of the report, but I think it
6 might be more familiar to talk about stations that
7 would be in the market if that's --

8 Q So ABC or NBC or CBS for the Washington
9 market would constitute a local broadcast station?

10 A That's correct. For example, WRC is
11 Channel 4 in Washington, D.C. And that is an NBC
12 affiliate or what's known as a network station.

13 Similarly, in this -- there are public
14 television stations in markets around the country.
15 One of the public television stations in Washington is
16 WETA. And they typically transmit programming from
17 the Public Broadcasting Service.

18 And then there are also what are known as
19 commercial independent stations. And these stations
20 are stations which are not affiliated with any
21 particular network or at least not one of the four
22 major networks: NBC, ABC, CBS, or Fox.

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1 Q Now, do local broadcast stations have any
2 special rights that exist in relation to the
3 distribution of their signals over cable?

4 A Yes. They have pursuant to "must carry"
5 regulations the right to, in essence, require that
6 they be carried in their market by local -- by
7 individual cable systems. Alternatively, they can opt
8 to negotiate with cable systems for the right to grant
9 the cable system the right to retransmit their signal.

10 Q So they have to actually engage in a
11 specific negotiation with those cable systems in that
12 event?

13 A If they choose the retransmission consent
14 option, yes.

15 Q Okay. Thank you.

16 Now if we can talk about distant broadcast
17 stations?

18 A Yes.

19 Q Is there any inherent difference between
20 the programming on a local broadcast station and a
21 distant broadcast station?

22 Q No. In fact, the distant broadcast

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1 stations are local broadcast stations in the market
2 where they are licensed to.

3 Q So they're called distant because they're
4 being sent distantly?

5 A To markets outside of their license
6 market.

7 Q But they're essentially the same stations?

8 A Same types of stations: network
9 affiliates, public television stations, and
10 independent stations.

11 Q Can you give me some examples of prominent
12 distant broadcast stations that we might all have
13 heard of?

14 A Well, the ones that are most generally
15 known are often referred to as the superstations and
16 specifically referred to that in this proceeding.
17 Those include WTBS from Atlanta, WGN from Chicago, and
18 WWOR from -- well, it actually originates in Secaucus,
19 New Jersey, but from New York.

20 Q Now, those are superstations. There are
21 other distant broadcast stations, though, too.
22 Networks can be broadcast as distant broadcast

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1 stations; correct?

2 A That's correct.

3 Q Okay. And, now, are those distant
4 broadcast stations available via both cable and
5 satellite?

6 A Yes, they are.

7 Q In this proceeding, are we dealing with
8 both network and non-network independent station
9 distant broadcast stations?

10 A Yes, we are. The DBS companies also
11 distribute packages of network signals. One of the
12 packages referenced in the report is Prime Time 24,
13 which is a service that offers network affiliate
14 signals from different cities. You get a different
15 group of stations depending on whether you are in
16 along the East Coast or in the Eastern half of the
17 United States or in the Western half of the United
18 States.

19 Q Okay. To clarify that, then, on cable
20 local broadcast stations have the right through "must
21 carry" to transmit locally their signals through
22 cables; correct?

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1 A That's correct.

2 Q And on satellite, are there any legal
3 limitations --

4 MS. CLEARY: Objection, Your Honor. This
5 exceeds the scope of the witness' direct testimony.

6 MS. BEHAN: If I could --

7 CHAIRMAN GRIFFITH: State your name and
8 identify yourself for the reporter.

9 MS. CLEARY: Jacqueline Cleary, American
10 Sky Broadcasting.

11 CHAIRMAN GRIFFITH: Okay.

12 MS. BEHAN: If I could just state,
13 actually, I'm only seeking to have him discuss what's
14 in his testimony on the top of Page 14, which relates
15 to direct TV customers are supposed to be located in
16 areas where such signals can now be received off air.

17 What I'm merely trying to do is identify
18 any limitations on the distribution of network signals
19 via satellite. And all I wanted to do is identify
20 what he means on this sentence at the start of Page
21 14.

22 CHAIRMAN GRIFFITH: Do you object to that?

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1 MS. CLEARY: I guess perhaps I was
2 premature. I didn't understand the question. But
3 I'll object at the end of the question if it goes
4 beyond direct.

5 CHAIRMAN GRIFFITH: At this point your
6 objection is withdrawn?

7 MS. CLEARY: Yes.

8 CHAIRMAN GRIFFITH: All right. Thank you.

9 THE WITNESS: Okay.

10 BY MS. BEHAN:

11 Q If you could go to the top of Page 14 so
12 that we can make sure we're sticking to your
13 testimony?

14 A Yes.

15 Q What did you mean when you said that
16 "Network affiliate stations in some instances are
17 broadcasting customers who are supposed to be located
18 in areas where such signals cannot be received off
19 air"?

20 A Well, it is a requirement consistent with
21 the Satellite Home Viewer Act that customers who are
22 located in areas where they can receive a local

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1 network affiliate off the air are not supposed to be
2 provided with or be able to receive a similar network
3 affiliate from a satellite company.

4 Q Now, the programming that's on distant
5 broadcast stations, can that be transmitted by cable
6 systems, DBS operators, and HSD services without
7 obtaining any consent from the program owners
8 whatsoever?

9 A Yes. They have a compulsory license.

10 Q And what is the quid pro quo, if any, for
11 being able to take that programming without any
12 consent?

13 A They pay a royalty fee or a licensing
14 royalty to the Copyright Office, which is then
15 distributed to the copyright owners.

16 Q All right. Now if we could go to basic
17 cable networks, which is another type of, shall we
18 call it, program distribution relationship? Can you
19 briefly discuss cable networks? Can you tell me what
20 basic cable networks means in terms of your testimony?

21 A Yes. The term "basic" refers to networks
22 that have typically been included as part of what is

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1 known as the basic package of services that is offered
2 by originally cable companies and also by many of the
3 satellite distributors.

4 These are services that, as I think I
5 mentioned previously, began to develop in the late
6 '70s. And then many more of them began to develop as
7 we moved into the early to mid 1980s. And many more
8 continue to develop today. There are well over 100 of
9 them out there that are available as potential
10 programming services.

11 And the emergence of these networks is
12 really designed to provide an additional level of
13 programming choice and variety to consumers to
14 encourage subscription in areas where over the year
15 signal reception might have been adequate already; in
16 other words, for cable to go in -- originally for
17 cable to go beyond being a reception service.

18 Some of the services were designed to be
19 niche services or to -- and by "niche," I mean
20 designed to appeal either, on the one hand, to a
21 specific audience category -- an example might be
22 Black Entertainment Television, which is targeted to

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1 African American audiences -- or to have a specific
2 type of programming, such as ESPN, which carries all
3 sports programming.

4 Certain other of the networks that
5 developed were more of a general entertainment
6 character similar to independent broadcast stations.
7 And those included -- USA Network and TNT are examples
8 of those types of services in --

9 Q When we use the word "independent"
10 broadcast station, we use the word "broadcast" there,
11 are you suggesting that we mean to refer to general
12 entertainment programming, types of stations that have
13 general entertainment programming, like TNT and USA?

14 A That's correct.

15 Q And you said also they're like independent
16 stations? Like TBS, WSBK, WWOR?

17 A That's correct.

18 Q And what they share is that they offer a
19 variety of general entertainment programming?

20 A That is what they share in common. They
21 offer a mix of series programming, movies, sports
22 programming, and, in other words, a variety of

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1 programming designed to appeal to a broad audience.

2 Q And then, again, the other stations that
3 are considered broadcast appealing to broad audiences
4 would be the network stations. Is that correct?

5 A That's correct, yes.

6 Q And so HBO would not be a broadcast
7 station, both because it's not broadcast and because
8 it falls into a different category?

9 A That's correct.

10 Q All right. While we're still on basic,
11 why don't we go to the chart on Page 15?

12 A Sure.

13 Q You indicate here these are the networks
14 that are considered among the industry to be the most
15 prominent non-broadcast station cable networks?

16 A That's correct.

17 Q What did you mean by "prominent" there?

18 A Well, this chart essentially ranks
19 networks by the extent of their distribution; in other
20 words, how many homes they are provided to or
21 available to. So prominent in that sense means widely
22 distributed.

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1 It could also be used with the exception
2 of C-Span on this chart because these tend to be the
3 services which capture larger audiences and which have
4 the most revenues as well.

5 Q Just for the panel's benefit, could you
6 describe the programming, then, that's listed under
7 "USA Network" in your chart?

8 A The description is "general entertainment
9 programming featuring movies and syndicated series."

10 Q Does it have other types of programming
11 besides movies and syndicated series?

12 A It does have some sports programming,
13 although it's limited.

14 Q What about TNT?

15 A TNT, general entertaining programming
16 featuring movies and sports and, again, also has some
17 original programming.

18 Q Now, what is the programming that's
19 typically included in a basic cable package?

20 A Well, in a basic cable package, prior to
21 the 1992 Cable Act, you typically had a combination of
22 the broadcast stations that we've talked about,

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1 including both the local and distant stations as well
2 as the basic cable networks that I've just described.

3 Subsequent to the 1992 Cable Act there
4 essentially became two components to the basic
5 package. Cable systems, in here speaking specifically
6 about cable, were required to offer a reception basic
7 tier of service at a relatively low fee in order to
8 make available the broadcast stations at a -- for the
9 purpose of making a reception service available to
10 customers.

11 Then what became commonly referred to as
12 an expanded basic or an enhanced basic service was
13 offered on top of that package, which would then give
14 the customer the right to get these additional basic
15 cable networks for a somewhat higher fee.

16 And the vast majority of customers
17 purchased both basic, broadcast basic, and the
18 enhanced basic package.

19 Q Now, are there any basic cable networks
20 that are available through the compulsory license?

21 A No. The basic cable networks are not
22 available subject to the compulsory license.

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1 Q Then how are the fees for basic cable
2 network determined?

3 A Well, basic cable networks negotiate
4 license fees for their distribution by all forms of
5 distributors through marketplace negotiations.

6 Q And so do you believe there's any
7 relationship between the value of a basic cable
8 network and its license fee?

9 A Absolutely. I think that the marketplace
10 negotiations reflect the value judgments of both the
11 buyer and the seller, the buyer's assessment of the
12 competitive benefit of offering the service, the --
13 how much they feel the service appeals to their
14 subscribers or will appeal to their subscribers,
15 either in acquiring subscribers or retaining them, and
16 as well as on comparative fees of other networks.

17 Q Now, do basic cable networks sell
18 advertising inventory?

19 A Yes, they do.

20 Q Can you just briefly describe that and
21 turn to Page 17 of your testimony?

22 A Yes. Basic cable networks retain control

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1 of about 80 percent of the advertising inventory that
2 they have within their programming. And they sell
3 this and retain the revenues from it on a national
4 basis. Then they typically make available about 20
5 percent of the inventory in the cable marketplace to
6 local cable systems, which have the right to sell that
7 in the local market.

8 In the satellite marketplace, that time is
9 typically used by the satellite companies for
10 promotional purposes.

11 Q Some do sell and some don't sell the
12 advertising?

13 A I believe that some may just be beginning
14 to sell some of that advertising inventory.

15 Q Premium and Pay Per View, can you briefly
16 discuss premium and Pay Per View services, as opposed
17 to the three types of services we have discussed so
18 far: network, superstations, and basic cable?

19 A Premium and Pay Per View services, you see
20 some of the premium cable networks. The most familiar
21 is probably Home Box Office, or HBO, as well as
22 possibly the Disney Channel, although that service is

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1 sometimes offered as a premium and sometimes as part
2 of basic packages.

3 But these services are those which are
4 sold separately for a fee over and above and separate
5 from the basic package fee. And purchasing it
6 entitles -- on a monthly basis entitles the customer
7 to receive it.

8 Pay Per View services are similar and
9 usually feature movie programming or sports events in
10 some instances, but the payment is on a per-program
11 basis, rather than for an entire service.

12 Q And, finally, we have local origination
13 programming, which I did not list on the chart. And
14 it was not to suggest that it's not quite as
15 important. But can you tell me about that?

16 A Well, local origination programming is
17 programming that is required by franchise authorities
18 to be provided by many cable operators. They in many
19 instances must dedicate one or more channels to the
20 provision of programming that they produce locally.
21 It might be high school sports events or the local
22 city council meeting or something of that nature.

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1 And then they are often also required to
2 provide access channels, which are channels that give
3 individuals in the community the right to come in and
4 develop their own shows and air them over the cable
5 system.

6 Q So like "must carry," the satellite
7 carriers don't have these obligations?

8 A No, they don't.

9 Q All right. The last topic -- and I'll
10 just be very brief on this -- I want to describe for
11 the panel just basically some of the programming
12 package approaches that are available on cable, DBS,
13 and HSD. Okay?

14 And I think it might be helpful for them
15 if we just turned straight to Table A1. And if you
16 can describe for me what is Table A1?

17 A Table A1 provides a list of the
18 programming services offered by TCI of Colorado, the
19 Denver cable system that they own and operate, is just
20 selected as an example of a typical cable system
21 offering.

22 What the table shows is what I previously

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1 described in terms of on the first page of the table,
2 a basic service. This is the reception or broadcast
3 basic service that is available or was available in
4 this case at a price of 9.90 dollars per month, and
5 expanded basic service, tier of service which for a
6 fee of 22.85 dollars, the customer can receive both
7 the services listed under expanded basic in addition
8 to the basic service.

9 Q Now you look at this chart, Table A1 and
10 compare it later to Table A2 and Table A3. I notice
11 that in Table A1, you have listed the actual channels
12 for TCI. Are those the actual channels at the time of
13 these stations were on in Denver?

14 A Yes. It is.

15 Q Because it's cable, there would be a
16 limited number of these channels?

17 A Yes. There would be. In this case I
18 believe it has a 62 channel capability.

19 Q Okay. Then if we go through to page two
20 of Table A1, I see that you have listed there some of
21 the other program packages available for expanded
22 basic premium service and paid for view that we just

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1 discussed?

2 A Yes.

3 Q Okay. Now if we can go to Table A2.

4 A This table describes the programming
5 service offerings and some of the packages of DirecTv.
6 One of the direct broadcast satellite or DBS
7 providers.

8 Q So that's one of the small dish providers?

9 A That's correct.

10 Q High powered small dish?

11 A Yes.

12 Q Okay. And if we could just go to these
13 packages. I notice that they are called something
14 different than the cable packages.

15 A Yes, they are. In essence, you can see
16 under the category listing that most, that the
17 services on page one and the top of page two are
18 what's generally referred to as basic services and/or
19 broadcast stations. There are three packages within
20 the basic option that DirecTv makes available to its
21 customers. The Plus service, which offers a number of
22 channels at a fee of around 15 dollars a month.

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1 If you want to get a little bit more than
2 that, you can get the Select choice service at about
3 20 dollars per month and add a number of channels.
4 Then if you, which most DirecTv customers do, want to
5 get the full range of basic services, you can purchase
6 the Total Choice package for a fee of 30 dollars a
7 month.

8 Q But again, comparing these to Tables A1
9 and Table A2, what we don't have here is a reception
10 basic. Is that correct?

11 A That's correct. There is no reception
12 basic tier because that is not something that the DBS
13 services are required to offer.

14 Q And finally, we have on DirecTv Table A2,
15 second page, a number of ala carte and premium
16 services.

17 A Yes.

18 Q And again, do those differ from the ala
19 carte and premium services listed for TCI, the cable
20 system?

21 A Yes. They do differ. In this instance
22 there are a few more options available. There also

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1 are services such as out of market sports programming.
2 In other words, sports packages that offer games that
3 aren't normally available to consumers either over the
4 air or within the territories of their particular home
5 teams in the market that they live. And there's also
6 the availability of the prime time 24 distance
7 broadcast network service.

8 It's also I think useful to describe the
9 pay for view offering too of DirecTv. The direct
10 ticket pay for view offering that's listed here
11 actually is a service that offers about 40 channels of
12 pay for view, compared with the pay for view offering
13 on Table A1, which is essentially a three channel
14 offering.

15 Q Again, that's because of the difference in
16 present channel capacity?

17 A Channel capacity, yes.

18 Q Finally, to close up your testimony, we'll
19 talk about Superstar. What is Superstar?

20 A Superstar is one of the c-band home
21 satellite dish packages.

22 Q Do you understand them to be parties to

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1 this proceeding or involved?

2 A Yes.

3 Q All right. Can you explain to me the
4 various packages that are available, generally
5 describe them through Superstar?

6 A Sure. Superstar again offers the
7 superview packages, is a package offering a number of
8 basic services as well as some distant broadcast
9 services. You will see somewhat distinctive that like
10 many of the c-band packagers, they offer a discounted
11 quarterly payment option or further discounts for
12 semi-annual or annual subscriptions.

13 They then offer certain additional
14 packages which add in additional basic services, as
15 well as additional distant broadcast stations in their
16 Superview and in Superview Plus packages and Superview
17 Ultimate packages.

18 What you will notice on page two and the
19 last page of the table, is that they also make
20 available many of the services that they offer on an
21 individual or ala carte basis, which is not typically
22 done by the other providers.

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1 Q Can I ask you a question about that? If
2 you go midway down the page, you see PT East and Fox
3 Net or PT West and Fox Net. You see listed there, you
4 have listed distant broadcast network. You have got
5 distant broadcast as opposed to local. Is this
6 programming that -- I see you have listed it as being
7 charged out to consumers at five dollars a month. I'm
8 looking at now from the last page, Prime Time East and
9 Fox Net.

10 A Yes.

11 Q Okay. Is that programming that is
12 actually obtained through the compulsory licensing
13 proceeding we're in today?

14 A Yes. It is.

15 Q Okay. Can you explain to me what a
16 customer gets on say for example, PT East and Fox Net
17 for five dollars a month?

18 A They get a set of the network signals,
19 ABC, CBS, NBC and Fox, that are included in this
20 package. As I mentioned previously, they get one set
21 of those stations, of stations that carry that
22 programming if they live in the eastern half of the

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1 United States. They would get another set of stations
2 if they live in the western half of the United States.

3 Q If you look at the bottom of that chart,
4 you see WTBS?

5 A Yes.

6 Q In that, a customer must pay 2.25 dollars
7 a month just to get WTBS and ala carte?

8 A That is correct.

9 Q Okay and is WTBS a superstation that is
10 obtained by the compulsory license by the satellite
11 carriers for redistribution?

12 A Yes. It is.

13 MS. BEHAN: All right. Mr. Chairman, with
14 that I have no further questions. Thank you very
15 much. I am going to turn it over for cross
16 examination.

17 CHAIRMAN GRIFFITH: All right. May I
18 suggest that we take our afternoon recess before we
19 turn him over? Twelve minutes. Thank you.

20 (Whereupon, the foregoing matter went off
21 the record at 3:30 p.m. and went back on
22 the record at 3:42 p.m.)

1 CHAIRMAN GRIFFITH: All right. Do you
2 want to cross examine?

3 CROSS EXAMINATION

4 BY MR. GLIST:

5 Q Mr. Trautman, I am Paul Glist. I am
6 counsel for the satellite carriers. How old is the
7 cable industry?

8 A Well, the cable industry really began
9 around 1950.

10 Q So would you characterize cable as a
11 mature industry?

12 A It's a relatively mature industry, yes.

13 Q How old is DBS?

14 A Well, DBS has been around since the early
15 1980s.

16 Q DBS?

17 A In terms of an authorized service. As a
18 consumer product since 1994.

19 Q As a consumer product.

20 A Well, since 1991 with PrimeStar.

21 Q But PrimeStar was a one meter dish.

22 A Yes.

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1 Q And it had limited programming choices?

2 A At large, yes.

3 Q I think in your direct examination, didn't
4 you date the birth of this as a real product from June
5 of 1994?

6 A Yes. I did.

7 Q So would it be fair to say that DBS as a
8 direct broadcast satellite is less than three years
9 old?

10 A Yes. As a popular consumer product, yes.

11 Q You went through a review of technology.
12 I just want to make sure that I understand something
13 that you said about cable head ends. I believe that
14 you said on direct that cable head ends primarily
15 receive programming off satellite. Is that correct?

16 A I did say that, yes.

17 Q But you didn't mean to say that there were
18 not other inputs to a cable head end?

19 A No. Not at all.

20 Q And that could include, for example, off
21 air reception?

22 A Yes.

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1 Q Microwave relay?

2 A Yes.

3 Q Terrestrial fibre?

4 A Yes.

5 Q And so all of those would be collected
6 from various inputs to a central point which we call
7 a head end?

8 A That's correct.

9 Q And from that point, it is then
10 distributed through the cable network out to
11 customers?

12 A That's correct.

13 Q Let's take WTBS, which I think is the
14 signal you dealt with in your direct. When a cable
15 head end takes down WTBS off of satellite, is it
16 taking down a c-band feed?

17 A Yes. It is.

18 Q When a home satellite dish customer with
19 a big dish takes down WTBS off the satellite, is it
20 taking down that same feed?

21 A Yes. It is.

22 Q Same signal?

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1 A Yes. It's taken off the c-band feed, yes.

2 Q Now when in your testimony you talk about
3 DBS use of a high-powered Ku-band satellite, I believe
4 you testified that a Ku carrier has to collect
5 programming from various sources and then re-uplink it
6 to their own satellite?

7 A That's correct.

8 Q And then from that satellite, it's
9 distributed out to paying customers through the DBS
10 distribution network?

11 A That is correct, yes.

12 Q How is that different from a cable head
13 end?

14 A Well, for the DBS operator, the head end
15 functions are the combination of the satellite and the
16 ground facility.

17 Q So the Ku carrier has split the head end
18 into a terrestrial component and a geostationary
19 component. Is that right?

20 A In essence, yes, although the satellite
21 actually functions more like the plant does in a cable
22 situation. I mean it represents in effect the

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1 connection between the ground facility and the
2 subscriber's home.

3 Q So from that point of view, the
4 terrestrial uplink could be looked at as a head end
5 and the uplink and downlink could be looked at as a
6 cable trunk?

7 A Yes. There is that -- you could look at
8 it that way.

9 Q In your testimony on page five, you speak
10 of scrambling. I think on your oral direct you also
11 use the term encryption.

12 A Yes.

13 Q What is done to scramble or encrypt a
14 signal?

15 A Well, in essence, are you asking me how
16 it's accomplished?

17 Q Yes.

18 A I am not an engineer in terms of how it is
19 accomplished, but essentially what is done is the
20 programming is altered so that unless a device at the
21 subscriber location is authorized to decode the
22 programming, the programming can't be viewed or in

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1 some instance heard. The audio can not be heard as
2 well.

3 Q So the channel has to be processed in some
4 way in order to secure it?

5 A That's correct.

6 Q And each individual customer then has to
7 be authorized or deauthorized according to what
8 package of service they have purchased, is that
9 correct?

10 A That is correct.

11 Q Who does that scrambling and descrambling?

12 A Well, the scrambling -- the descrambling
13 is done in the home by the set-top box or the unit
14 that a subscriber has in their home.

15 The scrambling for the programming that's
16 transmitted to homes in the HSD market it's the
17 scrambling that's done by the program service. In the
18 DBS market and the cable market, the scrambling is
19 done by the distributor themselves.

20 Q So a satellite carrier in the Ku-band is
21 the party responsible for scrambling the signal? Is
22 that what you are saying?

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1 A Yes.

2 Q And just to go back to the c-band market.
3 When you say the program supplier or the program
4 service has to do it, one example of that would be the
5 Weather Channel uplink in a signal, it would scramble
6 it, is that correct?

7 A That's correct.

8 Q But does WDBS, the broadcaster scramble
9 its signal?

10 A No. It does not. A carrier company, in
11 this case Southern Satellite Systems, is responsible
12 for that function.

13 Q I see. So both in c-band and Ku-band,
14 it's the satellite carriers who engage in the
15 scrambling and authorization process for the sale of
16 these signals?

17 A For the broadcast signals, yes.

18 Q You speak on page nine of DBS being a
19 substantial and growing competitor to cable. Do you
20 think that customers see DBS and cable as substitutes
21 for each other?

22 A Could you repeat the question? I'm sorry.

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1 MR. GLIST: Could you read back the
2 question?

3 (Whereupon, the court reporter played back
4 the question.)

5 THE WITNESS: In my experience, customers
6 view DBS as a new and improved version of cable.

7 BY MR. GLIST:

8 Q On page 10 of your testimony, you make
9 reference to digital video and audio which is provided
10 by DBS. I think in your oral direct, you spoke of
11 this being a higher quality than analog. Is it fair
12 to say that cable television delivers analog signals
13 to a subscriber?

14 A Yes.

15 Q And let me just walk from the head end up
16 to the customer to make sure we understand this
17 analogue transmission.

18 A Yes.

19 Q A cable operator has to route the signals
20 through trunk and distribution cable, and finally
21 through a drop to the home. Is that correct?

22 A That's correct.

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1 Q And because of the distance between the
2 head end and the cable subscriber, is it necessary to
3 amplify the signal periodically?

4 A Yes. The signal passes along the cable.
5 It gradually degrades or actually loses power as it
6 moves further from its origination point. Amplifiers
7 have to be placed along the plant in order to boost
8 the signal as it goes along.

9 Q Is there a certain distance an amplifier
10 cascades after which the signal, even though
11 amplified, becomes less than clear?

12 A Well, it certainly becomes of less high
13 quality than it was when it left the head end.

14 Q By contrast, the DBS signal comes directly
15 off satellite to a dish without that reamplification.
16 Is that correct?

17 A Yes. That's correct.

18 Q And the signals of over the air
19 broadcasters, they are transmitted by antennas on
20 towers. Is that correct?

21 A Yes. That's correct.

22 Q Are they also transmitted in analogue?

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1 A Yes. They are.

2 Q The propagation of that signal will depend
3 upon what?

4 A You mean in terms of the quality of its
5 reception?

6 Q Yes, sir.

7 A It will depend on a number of factors,
8 including the height of the antennae above the average
9 terrain in the market, and factors such as the
10 distance between the home from the transmit tower.

11 Q Could it also depend upon whether it's
12 using a VHF or a UHF channel to transmit?

13 A Yes.

14 Q Could it also depend on the amount of
15 power with which the signal is transmitted from the
16 broadcast tower?

17 A Yes. It could.

18 Q So with those various factors affecting
19 the propagation of broadcast signals terrestrially, is
20 it fair to say that there is a segment of the
21 population at the outer reach of a broadcast signal
22 would get less than digital quality signal?

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1 A Well, customers are receiving an analogue
2 signal to begin with.

3 Q They are getting analogue to begin, and
4 even that can get fuzzy?

5 A Yes. There are contours, a grade A or a
6 grade B contour, which reflects the signal pattern
7 that a broadcast station produces. At each level of
8 contour, the typical quality of the signal varies and
9 gets worse as you get farther from the transmitter.

10 Q Hasn't there been a recent opportunity for
11 the broadcast industry to move towards a digital
12 transmission of their signals?

13 A Yes.

14 Q Could you explain what that opportunity
15 consists of?

16 (No response.)

17 MS. BEHAN: If I could just make an
18 objection for the record. Mr. Trautman is not an
19 engineer. A lot of these questions are going into a
20 level of engineering specificity to which he has not
21 been suggested to be a witness.

22 I am going to continue to allow him to

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1 answer what he feels capable of answering, but as to
2 the intricacies of analogue versus digital versus
3 microwave versus fibre optic and coaxial, he has not
4 testified to those, but to the extent that he feels
5 comfortable, he can answer. I just wanted to make
6 that clear for the record.

7 CHAIRMAN GRIFFITH: That's fine. Thank
8 you.

9 THE WITNESS: Well, broadcasters have
10 recently agreed upon a high definition television or
11 advanced television standard within which they plan to
12 or intend to over the next several years introduce
13 digital broadcasts.

14 BY MR. GLIST:

15 Q The introduction of digital broadcasts
16 over this new advanced television spectrum would
17 involve substantial investment, would it not?

18 A By the broadcasters, they would have to
19 construct or supplement transmission facilities to
20 provide those services, yes.

21 Q And would that investment be substantial,
22 in your estimation?

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1 (No response.)

2 MS. BEHAN: Objection. Calls for
3 speculation.

4 CHAIRMAN GRIFFITH: Do you want to
5 respond?

6 MR. GLIST: I don't think I am asking for
7 speculation. He is held out as an industry expert.

8 CHAIRMAN GRIFFITH: Can you answer the
9 question without speculating? Just yes or no, can
10 you?

11 THE WITNESS: Yes.

12 CHAIRMAN GRIFFITH: The objection is
13 overruled.

14 THE WITNESS: The cost of providing
15 digital television service as a capital investment
16 will be fairly modest for large broadcasters in large
17 markets. It may be a significant capital investment
18 or be viewed as a significant capital investment for
19 smaller broadcasters in smaller markets.

20 BY MR. GLIST:

21 Q Do you generally follow this issue at the
22 FCC, for example?

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1 A Generally, yes.

2 Q Are you generally familiar with Chairman
3 Hunt's recent effort to get the broadcast networks to
4 commit to going digital in their top 10 markets?

5 A I am generally familiar, yes.

6 Q Do you know how that was received by the
7 broadcast networks?

8 A I am not familiar with the specific
9 response, no.

10 Q Do you know if they have embraced it?

11 A I believe that the major broadcasters are
12 going forward with testing of digital services in
13 selected markets. In Washington, for example, we have
14 a low power transmission going on right now.

15 Q In your direct testimony on page 10 and
16 also live, you spoke about the cost of dishes on the
17 ground for the home subscriber. I believe you
18 mentioned that initially these dishes were costing 700
19 to 900. Was that at the retail level?

20 A Yes.

21 Q And I believe you testified that there is
22 a price point now at retail of about 199?

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1 A Yes. It's not actually the cost of the
2 dish. It is the cost of the home receiving system,
3 which includes a dish and a set-top box.

4 Q Now is that the price or the cost?

5 A That is the price to the consumer.

6 Q Do you know whether the cost is higher
7 than that?

8 A I don't have specific information as to
9 that.

10 Q In preparing for this testimony, did you
11 have occasion to review the materials that were
12 produced by Joint Sports in association with your
13 testimony?

14 A Yes.

15 Q I'm handing you a document marked
16 Donaldson Lufkin and Jenrette, JT4. Could you take a
17 look at that and tell me if that is a document on
18 which you relied in preparing your testimony?

19 A Yes. It is.

20 Q And this is the kind of information on
21 which you relied in preparing your analysis?

22 A Yes. It is.

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1 MR. GLIST: At this time, I move that this
2 be marked for identification and admission as an
3 exhibit, SBCA Exhibit 1.

4 CHAIRMAN GRIFFITH: I can mark it for
5 identification at this time. Excuse me. Let me mark
6 it for identification as --

7 MR. GLIST: SBCA.

8 CHAIRMAN GRIFFITH: SBCA 1, okay. Mark
9 for identification.

10 MS. WOODS: Your Honor, I just wanted to -
11 - Michele Woods, for the Public Television plaintiffs,
12 to suggest that in previous meetings we found it
13 useful to have an X for exhibit so that this would be
14 SBCA Exhibit 1X, to distinguish from various -- for
15 cross examination, that is.

16 MR. GLIST: That's fine.

17 CHAIRMAN GRIFFITH: 1X. Okay. It's
18 marked for identification as SBCA 1X. Thank you.

19 (Whereupon, the document was
20 marked for identification as
21 SBCA Exhibit No. 1X.)

22 BY MR. GLIST:

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1 Q Could you turn to page seven of the
2 Donaldson report marked JSC 0023 at the bottom?

3 A I am at page seven.

4 Q There is a statement in this report that
5 the wholesale price is probably at 300. Do you see
6 that, in the last paragraph?

7 A Yes. I do see it.

8 Q Do you think that that's a fair assessment
9 of the current cost of a receiving apparatus on the
10 ground?

11 A That is consistent with my understanding.

12 MR. GLIST: Your Honor, shall we move this
13 into evidence at this time?

14 CHAIRMAN GRIFFITH: Are there any
15 objections?

16 MS. BEHAN: I have no objections except
17 that it's being moved into evidence be limited to the
18 purposes for which it was relied upon in the report.
19 This is a -- I believe this is an investor report and
20 he has relied on specific portions. So that's the
21 portion that I think that is appropriate to move into
22 evidence at this time.

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1 CHAIRMAN GRIFFITH: He's moving the entire
2 document into evidence. Is that correct?

3 MR. GLIST: It was produced to us by that
4 party as material on which he relied for his
5 testimony.

6 CHAIRMAN GRIFFITH: I understood him to
7 testify to the fact that he relied on this document.

8 MS. BEHAN: On certain portions of the
9 document that are referenced in his report, that's
10 correct.

11 THE WITNESS: I would like to add to my
12 answer, as well.

13 CHAIRMAN GRIFFITH: Wait just a minute,
14 please. The concern that we have at the moment is
15 that it appears in the rules that in cross
16 examination, a document like this can be relied on to
17 impeach the testimony of the witness. I understood
18 the witness to testify in direct testimony not as to
19 anything concerning the wholesale price, but the
20 retail price, was 199 I think, to a customer.

21 Now, he has testified also in your cross
22 examination to that same thing. I don't recall any

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1 testimony of his concerning the wholesale prices. I
2 understand that you are asking him if the 199 is
3 representative of the cost.

4 MR. GLIST: That is correct, Your Honor.

5 CHAIRMAN GRIFFITH: But this is not really
6 impeaching him, is it?

7 MR. GLIST: No. I am not -- this
8 gentleman has a wide understanding of many aspects of
9 this business. He had produced to us in discovery the
10 document on which he relied. I thought he had
11 forgotten an element of the report on which he relied.
12 Now if we want to treat this as refreshing, that's
13 fine.

14 CHAIRMAN GRIFFITH: He has already
15 testified that 300 dollars sounds about right.

16 MS. BEHAN: Your Honor, if I could just
17 make a statement since we are at the outset of the
18 proceeding.

19 CHAIRMAN GRIFFITH: Yes.

20 MS. BEHAN: A lot of the parties produced
21 documents in response to document requests. The more
22 forthcoming parties produced more documents. Merely

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1 because they produced documents as documents in which
2 there might be information that they relied upon does
3 not suggest a wholesale authorization of every single
4 document produced in discovery in this case.

5 I think that that would subvert the
6 process of discovery and would ultimately would allow
7 each of the parties, if you were to admit them as
8 substantive evidence, to cite to every single piece of
9 paper in discovery in this proceeding, and that would
10 be somewhat unwieldy for your to analyze what has been
11 substantively affirmed by a witness as opposed to a
12 piece of evidence he might rely on.

13 So my only objection is while I am happy
14 for the witness to explain what it is that he relied
15 upon within a particular document, I think that's
16 absolutely appropriate, and that portion of it be
17 admitted into evidence if he relied upon it. I think
18 the proper use of these types of documents is for
19 impeachment purposes, and I think it needs to be
20 tailored to the scope of the direct examination.

21 JUDGE GULIN: Mr. Glist, I think you have
22 gotten what you wanted out of the witness. He has

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1 admitted that the 300 dollar cost sounds about right.
2 All we're talking about now is an admission of the
3 document in the evidence. Rule section 251.47
4 specifically says if a document is not or would not be
5 supported by a witness for the cross examining party,
6 the document can be used solely to impeach the
7 witness's direct testimony. Therefore, it's not
8 itself substantive evidence.

9 Do you want to just withdraw?

10 MR. GLIST: I'll just withdraw the motion
11 to enter it into evidence then.

12 CHAIRMAN GRIFFITH: The document was
13 marked for identification as IX. It is withdrawn at
14 this point. Thank you.

15 THE WITNESS: I would like to add to my
16 answer, if possible.

17 MR. GLIST: That's within your rights,
18 sir.

19 THE WITNESS: That the cost has declined
20 and continues to decline, in my understanding.

21 BY MR. GLIST:

22 Q Okay. Let's just for purposes of my

1 asking you questions, let's just take 300 as a cost
2 for a price, whatever you want, 199. Just for
3 comparison with cable, do you have an idea of the
4 price or cost to install a cable subscriber to a cable
5 system? The plant is already in front of the house.
6 The house has not subscribed to cable.

7 A That's not really a relevant comparison
8 because you have to factor in -- the key part of the
9 economics of each business is the cost of building the
10 distribution system to get to the home first. So to
11 look at the cost of simply at the home is not really
12 a relevant comparison.

13 Q So you are saying that one has to look at
14 the economics of the entire distribution array rather
15 than just single out one particular element?

16 A I would say so, yes.

17 Q Well let me ask maybe a simpler one. Does
18 it cost a broadcaster anything to add a new viewer?

19 A From a capital cost perspective?

20 Q Right.

21 A No. I mean there are certainly
22 promotional expenses and other expenses, but from a

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1 capital cost perspective, I would say no.

2 MS. BEHAN: I am just going to object to
3 further cost questions. We were talking about retail
4 prices, and he's asking costs.

5 CHAIRMAN GRIFFITH: The objection is moot.
6 He has indicated that he is done. There will be no
7 more questions.

8 BY MR. GLIST:

9 Q On page nine, you have cited to a
10 consensus estimate of 15 million homes for DPH by the
11 year 2000. Now that figure, is that a combination of
12 DBS and HSD?

13 A In reviewing the document, it appears to
14 me that it is.

15 Q Do you know if the growth is coming from
16 the Ku-band or the c-band?

17 A Well, there was no specific discussion of
18 that in that particular document which showed the
19 consensus, to my recollection. However, I believe
20 that the growth was coming principally from Ku-band.

21 Q Those 15 million homes, are they drawn
22 from a particular universe of potential customers? Is

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1 it all television households?

2 A Well, the services are available to
3 essentially all television households in the United
4 States.

5 Q I am probably not making myself clear. I
6 thought that analysts who produced documents that
7 you've produced to me, I thought that they were saying
8 that there were certain target sizes of universes of
9 television households that are likely subjects for
10 taking a DBS dish. Maybe I misunderstood that. Is
11 everyone of the 92 million TV households equally
12 likely to take a dish?

13 A Well, no. As with any business, I believe
14 that you have target markets that are more likely or
15 in some cases less likely to take a product or to have
16 interest in a product.

17 Q Do you have a sense of the size of that
18 target market or what it might be for the satellite
19 carriers?

20 A Well in my judgement -- I am not sure I
21 understand your question. The size of the target
22 market, there are actually multiple target markets.

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1 MS. BEHAN: Your Honor, I am just going to
2 say I think he was referring to a document. He said
3 I have the document, you produced it to me. It was a
4 question that he changed. If there is something in
5 the document, maybe he'll feel free to show him. He
6 might be able to be clearer in terms of answering the
7 question.

8 BY MR. GLIST:

9 Q Well, if I dare touch SBCA 1X again,
10 perhaps you can help me understand a particular
11 comment. I am looking at page six of the Donaldson
12 report, which I thought was an analysis on which you
13 relied.

14 Contained within it in the middle
15 paragraph, there is a discussion of whether there are
16 five million homes not passed by cable or seven
17 million or 22 million, and whether RVs should be in or
18 out, vacation homes in or out. Is that information,
19 if that was not a part of your review, I don't want to
20 ask further about it. But if it was, I am trying to
21 understand what that means.

22 (No response.)

1 MS. BEHAN: Your Honor, I just want to
2 object here. He is talking about 15 million homes, a
3 consensus. There's two sources of the information
4 that he relied upon. They are both listed in the
5 testimony. On one, Sky Trends in an industry
6 publication that SBCA had. One, the cable industry,
7 Lufkin Donaldson. I really don't believe that they
8 should be confused. So I would like the witness to
9 say which one he is relying on.

10 CHAIRMAN GRIFFITH: I think that's
11 appropriate.

12 MR. GLIST: That's fine.

13 THE WITNESS: Well, I want to make sure I
14 am not mis-stating myself, but I don't believe that I
15 used the cable industry outlook report in citing
16 projections for DBS growth.

17 BY MR. GLIST:

18 Q On page nine, footnote six of your
19 testimony, am I misunderstanding that?

20 A Well for the end of 1996, yes. Not for
21 what would now be future projections.

22 Q I see.

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1 A This report, which was prepared in
2 September of 1996, talked about estimates of as of
3 three months hence what it estimated the customer base
4 to be.

5 Q I see. So Donaldson was looked to for the
6 past, and Sky Trends for the future?

7 A Not precisely, but this reference
8 specifically applies to Donaldson's estimate of five
9 million homes as of year end 1996. I am not sure that
10 the Donaldson report was relied on for other aspects
11 other than that, except as referenced.

12 Q Okay. Then let's go onto a more
13 interesting topic. We spent some time during your
14 direct examination updating the record to the extent
15 that Echo Star, which in your written testimony was
16 discussed in alliance with U.S. West, has in fact gone
17 with another party. Is that correct?

18 A That's correct.

19 Q And that proposal is that Echo Star and
20 ASkyB would merge their operations?

21 A That's correct.

22 Q Why would a company like Echo Star be

1 talking about such alliances or making such alliances?

2 A Well, I imagine it would have something to
3 do with someone offering them a billion dollars for a
4 50 percent interest.

5 Q But they are not going to pocket that
6 billion and walk away, are they? They are going to do
7 something with it, aren't they?

8 A Well certainly they are, but it
9 substantially enhances their asset value. In fact, I
10 believe their stock price went up almost 10 dollars a
11 share on the day of the announcement.

12 Q Do you have a view as to whether such
13 combinations are helpful or hurtful to the competitors
14 in this industry?

15 A I'm not sure what you mean by helpful or
16 hurtful. I think I would say that it enhances the
17 position of Echo Star and ASkyB as a combined entity.

18 Q As a combined entity. Did you go to the
19 DBS summit this year?

20 A No. I did not.

21 Q Do you read about it in the trades?

22 A Yes.

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1 Q How would you react to this, which was a
2 report coming from the summit. Wall Street sees this
3 business with sheer terror. The market may be big
4 enough to support one and perhaps DBS players, Bilotti
5 said. How do you react to that? Do you agree with
6 that?

7 (No response.)

8 MR. OSSOLA: Your Honor, I'm Charles
9 Ossola with Commercial Networks. Counsel is going
10 beyond the scope of direct. He's calling for
11 speculation of the witness. I think this is improper.

12 CHAIRMAN GRIFFITH: Want to respond?

13 MR. GLIST: He has testified to this
14 particular combination. I am trying to get a sense as
15 to why he has testified to it and what he thinks about
16 it.

17 CHAIRMAN GRIFFITH: The objection is
18 overruled.

19 MS. BEHAN: Then I would like to see the
20 entire article.

21 CHAIRMAN GRIFFITH: Okay. Let me just
22 inquire. How much do you anticipate is going to be

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1 involved in your cross examination of this witness?

2 Are we talking about 10 minutes or 10 hours?

3 MR. GLIST: I think two hours, Your Honor.

4 CHAIRMAN GRIFFITH: A couple hours. And
5 then you are going to want to do redirect that way?

6 MS. BEHAN: Redirect --

7 CHAIRMAN GRIFFITH: He anticipates about
8 two more hours of cross.

9 MS. BEHAN: We do want redirect.

10 CHAIRMAN GRIFFITH: I was just trying to
11 think if there's any way to finish with the witness
12 today, but apparently that's not possible.

13 MR. GLIST: Realistically, I don't think
14 so, Your Honor. If you want, we can break and start
15 fresh in the morning.

16 CHAIRMAN GRIFFITH: What's your plan?

17 MR. GARRETT: Whatever is convenient for
18 the panel with this witness. I would just make one
19 request, Your Honor. Bob Garrett, for the Joint
20 Sports claimants. That is, that the witness for
21 tomorrow, Mr. Desser, was taken out of turn to testify
22 tomorrow because he could not be available Monday and

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1 Tuesday of next week as a result of long-standing
2 engagements. I would ask that if we are going to
3 break now and consume some more time tomorrow morning
4 with Mr. Trautman, that perhaps we could lengthen the
5 day tomorrow or whatever, just to ensure that Mr.
6 Desser is finished by Monday.

7 MR. GLIST: Could I suggest we begin at
8 9:00 instead? Is that possible? That would take the
9 pressure off.

10 CHAIRMAN GRIFFITH: At 9:00?

11 MR. GLIST: 9:30?

12 CHAIRMAN GRIFFITH: Let's compromise,
13 9:30. I have a 40 minute Metro ride from Vienna.

14 JUDGE GULIN: How late do you want to go
15 tonight?

16 CHAIRMAN GRIFFITH: Want to go until 5:00
17 tonight?

18 MS. BEHAN: That would be wonderful.

19 CHAIRMAN GRIFFITH: If we change the time,
20 we don't have to republish in the Federal Register or
21 anything.

22 MR. GLIST: If we could go until 10 to

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1 5:00. Many of the parties on our side have a related
2 conference call at 5:00 across the street.

3 CHAIRMAN GRIFFITH: Okay. Let's go 20
4 more minutes and then we'll start at 9:30 in the
5 morning. All right? You all give some thought to
6 this when you are discussing the scheduling. If you
7 want to change these hours that I have set, 10 to
8 4:30, let us know. If you want to start at 9:30,
9 fine. If you want to go to 5:00 every day, that's
10 fine too. Just let us know. Okay? You agree?

11 All right. Go ahead.

12 CHAIRMAN GRIFFITH: I show that Public
13 Broadcasting has been left out.

14 MR. SEIVER: Sorry, Your Honor. John
15 Seiver. I'll pass these up to the panel first. Then
16 I'll get everybody.

17 MS. BEHAN: Are you marking this as an
18 exhibit?

19 MR. GLIST: We can certainly mark this for
20 identification as SBCA 2X.

21 CHAIRMAN GRIFFITH: SBCA 2X for
22 identification. All right.

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1 (Whereupon, the document was
2 marked for identification as
3 SBCA Exhibit No. 2X.)

4 BY MR. GLIST:

5 Q Mr. Trautman, what I am trying to get to
6 is your reaction to the sentiments expressed in the
7 two sentences. I'll give you a moment to read that in
8 context.

9 A Which two sentences?

10 Q Fourth paragraph down is a quotation from
11 State Street, "Wall Street sees this business with
12 sheer terror."

13 The other quotation on which I was looking
14 for your reaction was a quotation in the second
15 column, concerning Morgan Stanley, two and three
16 paragraphs from the bottom up column.

17 A And which statement is that? The one
18 that's not in quotes?

19 Q Yes. The one that is not in quotes, that
20 is attributed to Mr. Bilotti.

21 A Right after "it would take an act of God
22 to stop DirecTv from being successful?"

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1 Q Indeed, right after that.

2 A Okay. No, I would not agree. Well, how
3 Wall Street views the business I think changes from
4 month to month, but I would not agree with the second
5 statement.

6 Q So you have -- do you know how Wall Street
7 views the business today?

8 A I don't know that I would use the
9 characterization sheer terror.

10 Q How might you characterize it?

11 A Well, I believe there may be some concern
12 that stock prices of the DBS companies have fallen
13 over the last few months prior to the Echo Star and
14 ASkyB partnership. That was after a rapid increase in
15 the prices of the companies shortly prior to that.

16 Q So you think that changed after the
17 announcement of a proposal to merge Echo Star and
18 ASkyB?

19 A No. That was not when the price decline
20 began.

21 Q So the evaluation has not taken an uptick
22 for the industry since then?

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1 A It took an uptick for participating
2 companies.

3 Q But not for the others?

4 A No.

5 Q On page 12 of your testimony, you speak
6 about the local broadcast stations, cable and HSD.
7 When you say DBS and HSD subs do not receive local
8 broadcast stations, you mean generally don't you?

9 A Where are you referring to again?

10 Q Bottom of the page 12, two lines up I
11 believe, two or three lines up.

12 A That's correct. Generally yes.

13 Q Generally. So if I were in the Atlanta
14 ADI, for example, and I took a DirecTv package.

15 A You would get WTBS. That's correct.

16 Q That gets WTBS. Are you familiar with
17 areas of dominant influence or ADIs?

18 A Yes.

19 Q Are there some very large areas of
20 dominant influence?

21 (No response.)

22 MS. BEHAN: Your Honor, I am going to

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1 object. He has now gotten beyond something that's in
2 the testimony. He may link it up.

3 MR. GLIST: I will link it up. I need to
4 --

5 MS. BEHAN: We at least need an
6 explanation of the terms that he is using when he uses
7 them if it's not a term that has anything to do with,
8 and is way beyond the scope of direct testimony.

9 CHAIRMAN GRIFFITH: Yes.

10 MR. GLIST: It is fair to explain what I
11 mean by an ADI. I think this is familiar to people
12 like Mr. Trautman and to myself. I won't be moving it
13 in.

14 CHAIRMAN GRIFFITH: Can you identify what
15 it is?

16 MS. BEHAN: Excuse me. I still am
17 confused about it. I am going to object to the use of
18 these kinds of demonstratives if we can't see them.
19 I mean if he's going to show it to us and we can all
20 be there and be with him, that's fine.

21 CHAIRMAN GRIFFITH: Tell us what it is,
22 please.

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1 BY MR. GLIST:

2 Q Mr. Trautman, is the lower 48 United
3 States divided up into areas of dominant influence for
4 certain ratings and regulatory purposes?

5 (No response.)

6 MS. BEHAN: I'm going to object one more
7 time. I would like a definition of what an area of
8 dominant influence is.

9 CHAIRMAN GRIFFITH: Yes.

10 BY MR. GLIST:

11 Q Mr. Trautman, do you know what an area of
12 dominant influence is?

13 A Well, in this case it's defined as an
14 area, it's a market definition. For example, the
15 easiest one to see is probably say for example the
16 Salt Lake City area of dominant influence. That would
17 be the area within which television stations
18 originating in Salt Lake City are considered to have
19 dominant influence.

20 Q I'm not trying to belabor this point. I
21 just need him to get through the threshold questions.
22 The Denver ADI seems to have arrows pointing up into

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1 Wyoming and Nebraska. Do you know whether those
2 portions of those other states are considered part of
3 the Denver ADI?

4 A I believe there are certain counties in
5 other states that are a part of the Denver ADI, yes.

6 Q So if I lived up there and could not
7 receive a Denver network affiliate off the air, but
8 subscribed to it through a satellite carrier, is that
9 a local signal or a distant signal?

10 (No response.)

11 MS. BEHAN: Your Honor, I am just going to
12 object for the record. I just want a rolling
13 objection until we learn what the relevance of this
14 testimony is to anything that he said in his direct.
15 I think that while we want to have a broad scope of
16 cross examination, there has to be some limits,
17 particularly because there's a lot of conclusions in
18 this chart. I don't know who did it. I don't know if
19 it's reliable. I know nothing.

20 He is being asked questions about it. I
21 don't know what the questions are for. So I am just
22 going to have a rolling objection until I find out

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1 that information.

2 CHAIRMAN GRIFFITH: Mr. Glist, we need to
3 have you number one, identify the chart for the
4 record.

5 Secondly, we want a proffer from you as to
6 where you are going so we can make a determination as
7 to whether or not you are exceeding the scope of the
8 direct examination.

9 MR. GLIST: My proffer, Your Honor, is
10 simply as in the example of WTBS being received within
11 the Atlanta market, that Denver network affiliates
12 that are carried on satellite can be sold within far
13 flung reaches of the Denver local market.

14 I was trying to clarify that what the
15 witness has testified to with respect to local
16 stations not being available to TBS subscribers is not
17 exactly correct.

18 CHAIRMAN GRIFFITH: Do you have an
19 objection?

20 MR. STEWART: John Stewart for the
21 broadcasters. I know, and others in the room know a
22 little bit about this ADI concept. I would request

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1 that the panel order Mr. Glist if he is going to
2 question on this exhibit, to have a sponsoring witness
3 who will explain precisely what the definition of an
4 ADI is, how it's defined, and to explain also its
5 current status as opposed to its historical status and
6 its regulatory status. All of those things are
7 significant.

8 CHAIRMAN GRIFFITH: Do you intend to have
9 a sponsoring witness for this information?

10 MR. GLIST: No. In fact, I don't wish to
11 belabor this point any longer because it's not
12 necessary. It's raising a fracas that really isn't
13 much more than this issue is worth. I was trying to
14 clarify the point. So be it.

15 CHAIRMAN GRIFFITH: So it's over.

16 MR. GLIST: It's over.

17 MS. WOODS: Your Honor, Michele Woods.
18 May I just make a general suggestion that even for
19 demonstrable exhibits there be copies available for
20 counsel? It has been hard for us to see the documents
21 up on the board.

22 CHAIRMAN GRIFFITH: Thank you. These

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1 should be available.

2 MR. GLIST: I never expected that ADI
3 would be so disputed among a crowd such as this.

4 CHAIRMAN GRIFFITH: Nine minutes left.

5 BY MR. GLIST:

6 Q Mr. Trautman, can you take a look at Table
7 A1 of your testimony?

8 A I am looking at Table A1.

9 Q In the basic service for the Denver
10 system, WTBS is listed as a component. Is this signal
11 the same signal that is sold to a c-band direct, c-
12 band satellite customer?

13 A I believe it is, yes.

14 Q Do you know what the copyright payments
15 are for the Denver system for the basic service of
16 9.90 per month?

17 A No. I do not.

18 Q Are you familiar with how cable copyright
19 is calculated?

20 A Generally, yes.

21 Q Are you sufficiently familiar to assess
22 this?

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1 (No response.)

2 MS. BEHAN: Excuse me. I'm confused. How
3 copyright royalties are calculated? I'm just confused
4 by the question.

5 CHAIRMAN GRIFFITH: Do you want to restate
6 the question, please.

7 MR. GLIST: I was asking him to try to
8 assess the copyright payments by the Denver system for
9 this basic service to which he has testified.

10 MS. BEHAN: Could you hold for a second?
11 Okay, I have no objection.

12 CHAIRMAN GRIFFITH: Okay.

13 MS. BEHAN: To the extent that he
14 understands it.

15 CHAIRMAN GRIFFITH: If you are able to
16 answer the question, sir.

17 THE WITNESS: I believe I can provide an
18 estimate. There appear to be two distant broadcast
19 stations listed on Table A1 as part of the basic
20 service. I would estimate that the fee paid for those
21 services would approximate one and a half percent of
22 the basic service retail price.

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1 BY MR. GLIST:

2 Q On page 14 of your testimony, where you
3 are also speaking about this aspect of a cable
4 compulsory license, you mentioned there as well that
5 cable royalties are based on their revenues and the
6 number of distant signals that they carry. Is that
7 correct?

8 A Where was that in my testimony?

9 Q Page 14. Middle paragraph.

10 A Yes.

11 Q Does this mean that if basic cable
12 revenues decline then the royalties decline?

13 A I think that would be fair to say. As
14 long as it's those particular revenues that they are
15 paying royalties based on.

16 Q In your oral direct testimony, you spoke
17 of retransmission consent by a broadcast station given
18 to a cable television operator. Do you recall that
19 exchange with Ms. Behan?

20 A Yes.

21 Q When a broadcast station grants
22 retransmission consent, does that clear all the

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1 copyrights in the underlying broadcast signal?

2 (No response.)

3 MS. BEHAN: Objection. This calls for
4 legal speculation. I'm not sure it's quite clear.

5 CHAIRMAN GRIFFITH: Do you want to respond
6 to the objection?

7 MR. GLIST: He's testified to
8 retransmission. He's testified to copyright. I am
9 trying to separate the two to the best of the
10 witness's ability. If he can't distinguish them,
11 that's fine and I'll take that answer.

12 MS. BEHAN: I just didn't understand the
13 question.

14 CHAIRMAN GRIFFITH: Do you understand the
15 question? Can you distinguish?

16 THE WITNESS: I'm not certain of the
17 answer to the question.

18 CHAIRMAN GRIFFITH: That settles that.

19 BY MR. GLIST:

20 Q The DTH compulsory license is not a
21 percentage of revenue, is it?

22 A No.

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1 Q It's a flat fee assessed on the particular
2 signal?

3 A Yes.

4 Q So as you sell more of those to more
5 customers, then there's a direct growth in the royalty
6 pool?

7 A Yes. Just as in the cable industry where
8 if you obtain more subscribers, generate more
9 revenues, you pay more royalty.

10 Q But I thought you said that if cable rates
11 decreased, then the royalties would go down
12 proportionately.

13 A No. You asked me about cable revenues.

14 Q You were correct, sir. Let's suppose that
15 cable rates were cut 16 percent and cable
16 subscriptions increased by five percent. What would
17 the effect on the royalty pool be?

18 A I don't think that is a valid example from
19 market place conditions.

20 Q Are you capable of answering that
21 question?

22 (No response.)

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1 MS. BEHAN: I am going to object to the
2 question. I think it's vague and speculative. But I
3 would ask the witness to explain why he thinks it's
4 not valid.

5 CHAIRMAN GRIFFITH: Did you say you could
6 not answer the question?

7 THE WITNESS: No. I said I didn't believe
8 that the example was a valid illustration of anything
9 that I am familiar with in the market place.

10 CHAIRMAN GRIFFITH: Okay. Wait just a
11 moment. The objection is overruled.

12 THE WITNESS: Could you repeat the
13 question or have it read back?

14 BY MR. GLIST:

15 Q I'll repeat it. I tried to go easy on
16 you. If basic cable rates are reduced by 16 percent
17 and basic cable subscriptions are increased by five
18 percent, do you know what the effect would be on the
19 royalty pool if you hold all the signal carriage
20 equal?

21 A Well, if that were to happen, revenues
22 would decline and therefore, it's likely that

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1 royalties could also decline.

2 Q Do you know what has happened in fact in
3 the cable royalties?

4 A Not specifically, no.

5 MR. GLIST: I think this is the breaking
6 point, Your Honor.

7 CHAIRMAN GRIFFITH: All right. Ladies and
8 gentlemen, thank you very much. We'll recess until
9 9:30 tomorrow morning.

10 (Whereupon, at 4:50 p.m. the proceedings
11 were recessed, to reconvene at 9:30 a.m. the following
12 day.)

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CERTIFICATE

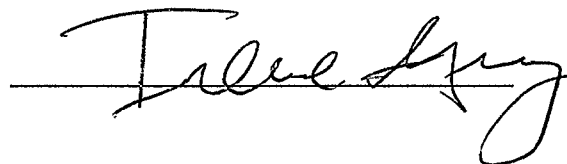
This is to certify that the foregoing transcript in
the matter of: Hearing: Satellite Rate Adjustment
 Docket No. 96-3 CARP-SRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 13, 1997

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

A handwritten signature in cursive script, appearing to read "Irene H. King", is written over a horizontal line.

Copyright Arbitration
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Satellite Rate Adjustment

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